

No. 12506

United States
Court of Appeals
for the Ninth Circuit.

WESTERN PACIFIC RAILROAD CORPORATION and ALEXIS I.
duP. BAYARD, Receiver,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
DEEP CREEK RAILROAD COMPANY, THE WESTERN REALTY
COMPANY, THE STANDARD REALTY AND DEVELOPMENT
COMPANY and DELTA FINANCE CO., LTD.,

Appellees.

MEREDITH H. METZGER, HENRY OFFERMAN and J. S. FARLEE
& CO., INC.,

Appellants,

vs.

WESTERN PACIFIC RAILROAD COMPANY, SACRAMENTO
NORTHERN RAILWAY, TIDEWATER SOUTHERN RAILWAY,
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REALTY COMPANY, THE STANDARD REALTY AND DE-
VELOPMENT COMPANY and DELTA FINANCE CO., LTD.,

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Transcript of Record
In Five Volumes
Volume II
(Pages 445 to 910)

Appeals from the United States District Court,
Northern District of California,
Southern Division.

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Mr. Adams: No order is required for that purpose.

The Court: You are entitled to have anything you want to rely on in the record. That stipulation is an exhibit in the case, isn't it?

Mr. Adams: Yes, it was an exhibit.

Mr. Clark: The pre-trial order is.

Mr. Adams: The pre-trial order is an exhibit, there will be no question about it.

The Court: If there is any question, that pre-trial order can go in as part of the record.

Mr. Lasky: That may serve our purpose as far as proposed finding 7.

The Court: If there should be any question about it, I will order it included in the record.

Mr. Levy: If the court please, I had some other proposed findings. There were only five or six of them. [31]

Mr. Adams: Do I understand that this matter is disposed of, your Honor? I would suggest that we stay with this one subject.

Mr. Levy: That was what I was about to ask the court, whether the court wished to proceed with the other motions before the court or wait.

The Court: As Mr. Levy has come a long way to present this matter, I don't want to take sort of snap judgment on it, but I feel, in my opinion, that that does not affect the basic grounds upon which the opinion is based. Anything that you want in the record so that you can properly present that up above, the court will make such an order as

will enable you to bring up any of these records that you wish.

Mr. Levy: I have in mind, if your Honor would permit me, I would like to make a few further comments with respect to our different lines of thought unless you think that no point will be served by it.

Mr. Lasky: I will defer my other matters until this has been disposed of.

The Court: I don't want to shut you off. Is there anything else that plaintiff wishes to present?

Mr. Levy: Just this one observation: Your Honor seems to think that the pre-trial order had importance only insofar as it might reflect upon some procedural disabilities that might occur in the course of the litigation. I think you so [32] expressed yourself just a moment ago.

I don't see any difference—let me withdraw that and state this: I think that in so narrowing the effect of that pre-trial order, you set a premium and in effect penalize counsel who urged the necessity for an injunction at the time that they did so, because, believe me, had I had the foresight and mental powers and perspicacity to anticipate specifically what your Honor decided in this case, I would have stated to the court that “one of the reasons why I want this corporation to have physical possession of the reduced amount of the refund proceeds is because this court may conclude that the transaction with the government was such that it would leave the parties where it finds them.”

And had I had any such notion in mind, I would have so stated to the court.

Now in lieu of that, this is what I did state to the court—and I quite frankly say lacking the brain to anticipate what the course of the long litigation could produce where possession would become an all-important factor—and this is what developed; I am reading from the transcript of that argument.

“The Court:” —let me jump that and come to this. I may paraphrase. You, that is, the court, say:

“How can we the plaintiff be damaged otherwise by the form of this settlement?”

And I went on to state how. [33]

“Let me pursue that a moment. Assuming each party had in its possession what it would normally possess if the government had approved of the tax returns and paid the refunds, and assuming that this court evolved this theory of law, and it is not unusual, that the parties had no agreement as to how the tax savings should be shared. The railroad company possesses then ten million one. The parties have no agreement as to how the refund shall be shared. That has been paid to the corporation by the government. Now, equity, in view of the fact that the parties had made no agreement, equity says, ‘We will leave the parties where we find them.’ That is a possible conclusion of this court that I am hypothesizing, and if that were the conclusion of the court then the railroad company

would be left with \$10,100,000 and the corporation would be left with the \$4,200,000. This settlement makes that conclusion impossible because only the railroad company has the \$10,100,000. We do not have the \$4,200,000, so that to our mind is a hazard."

That is the way in which we were thinking when that request for an injunction and the pre-trial order were submitted. We could not be expected to anticipate every respect in which possession might become of crucial importance in the determination of a long lawsuit, but our intuition was sound, and that [34] is, that we ought to have possession of what in the normal ordinary course we would have possession of but for the mechanics of the settlement adopted by the defendant and its representative vis-a-vis, the United States government.

The Court: How would you get the possession without some judgment or order?

Mr. Levy: Very simply.

The Court: How could you get possession of the \$3,000,000?

Mr. Levy: You mean right today?

The Court: No, no, at the time this happened, how were you going to get possession?

Mr. Levy: Your Honor answered that before. The United States government was not concerned with any internal squabble between the parties, a consolidated family, substantially.

The Court: You were coming in asking this court to issue an injunction, weren't you?

Mr. Levy: Certainly, to restrain settlement.

The Court: And this pre-trial order was made in lieu as a settlement of the application for injunction.

Mr. Levy: Exactly.

The Court: Now, it, the railroad company, was not admitting that you were going to get this three million some odd dollars——

Mr. Levy: From the U. S. Government?

The Court: Yes. [35]

Mr. Levy: The defendant railroad company itself cannot deny that were the government to pay the refund claim or to settle it separately, the plaintiff in this case would have had possession. Of that there is no dispute.

The Court: If you could have got it, but I don't suppose the defendants' representatives would have stood by and let you collect that.

Mr. Levy: Exactly. That is why we resorted to this court and that is exactly why we say——

The Court: It was a fight over who was going to get it. It would have taken some sort of judgment to determine that. You couldn't by some act of your own have determined that matter in pre-trial.

Mr. Lasky: The government would only recognize the plaintiff upon the settlement.

Mr. Levy: We are not talking about the same thing. Let me go back one step. The regulations and the statute provide——

The Court: I understand that; the refund goes to the man that pays it.

Mr. Levy: Oh, no, that is in error.

The Court: The refund goes to the taxpayer.

Mr. Levy: That is it exactly, which is the parent corporation in our family. I am not saying that by the government's act of paying to the parent, ergo, ipse dixit, the [36] parent has title. I am not saying that. What I am saying is that there can be no dispute that the refund claim in normal course would have been paid to this plaintiff. This plaintiff would have had possession with a cloud and the cloud would have been resolved only by this lawsuit. And I say that this court, had it resolved the cloud and said, as a matter of the fundamental rights of the parties here, the defendant is entitled to a judgment, this pre-trial order would have become academic and just as the pre-trial order would have become academic if the court had decided there is nothing to the defense of laches or limitations. But the court did not say that. What the court said was that "we will not inquire into the matters; we will leave the parties where we find them because the transaction in origin was contaminated." Therefore, possession is not academic. This is one of the few instances where a lawsuit winds up with nothing being more important than who has possession rather than who has title.

The Court: Personally I think that was a lot of anxiety and effort over nothing, because, whether you entered into a stipulation or not, if this court decided that the plaintiff was entitled to all this money, there would have been a judgment against

the defendants for that amount of money and they would have had to pay it. So it doesn't loom very large in my mind what the effect of this pre-trial order and stipulation is. What difference does it make? If as a result of [37] this litigation it was found that this money should have belonged to plaintiff, there would have been a judgment against the defendants to pay that amount of money.

Mr. Levy: May I pose a question to your Honor? I am trying to throw some light on this problem; I am not looking for a fight, so to speak, just a point of great interest and great importance in this lawsuit. Let me say nobody need have any guilty feeling about this——

The Court: You weren't worried about that, that if you won this case you wouldn't have gotten judgment for the amount of the taxes?

Mr. Levy: No, but what I was worried about was that possession might be the determinative factor.

The Court: That brings me back to what I said in the very beginning. The only point of that was that if it was determined on the merits that you were entitled to this money, that you would not have been up against some technical obstacle that you were not entitled to get it nevertheless because you did not have possession.

Mr. Levy: Not at all. It is just as appropriate that what we were worried about was that a court should stop short of inquiring into the merits and merely rule on something which makes possession all important, which is what you have done.

Let me ask one more question. [38]

The Court: All right.

Mr. Levy: Let me pose this question to you: Take my case of the thieves having fallen out and one suing another, and take my case where, not that they did not have any agreement but they indeed had a contract between them,—a unique kind of thief—and under the contract the plaintiff came into court merely stating a cause of action for breach of contract, the contract being annexed, and in addition saying, “The defendant has the proceeds; we are entitled to 50 per cent by reason of the contract.” That is his cause of action. The defendant comes in and espouses any number of defenses. Then the case goes to trial, and your Honor, before you have heard more than one witness on the stand—the gentleman testifies that the way in which the fruits of this venture came about is, “I, Jones, the witness, held up Pete Smith,” I could visualize where in that instant the court would say, “I have heard enough,” and decide the case at that point without knowing who had what right to the proceeds or what right to the title and decide the case and say, “I leave the parties where I find them.” That makes only one thing important to the litigants, and that is, where do you find them? Where do they find each other? Possession may not be important to the court; title is of no importance to the court, but so far as the judgment is concerned and these two parties, it is all-important to know who sits holding what. [39]

The Court: Mr. Levy, you are really making a motion for a new trial in this matter, and I hope I am not going to have to hear it all over again.

Mr. Levy: No.

The Court: I don't see how it possibly arises in connection with findings, because as part of the record you could bring it up to the Appellate Court and make your argument there.

Mr. Levy: That is why we moved to reargue and to amend the findings of fact. That was our reason. We felt that it would require an amendment of only the last line, but it happens to be the all-important one.

The Court: Well, for the sake of the record, I will deny your motion, Mr. Levy, and on your record I will protect you on your right to bring up these matters in connection with the settlement, with the making of the pre-trial order so that you may have those matters before the court on which you base your appeal.

Mr. Lasky: Shall I proceed with the other matters?

The Court: Yes.

Mr. Lasky: There are two other matters, and one of them I would say is a formal matter and ought to be non-controversial. Whether it is going to be objected to, I am not sure.

It is a motion to bring in the receiver as a party plaintiff. On October 19 of this year the Chancery Court of [40] the State of Delaware appointed Mr. Alexis DuPont Bayard as receiver of the plaintiff corporation.

Under section 68 of the Delaware Corporation Law, a court of chancery may revoke a charter for anyone of a number of causes, and under the general equitable law, your Honor, a court may take jurisdiction of a corporation where its primary corporate duties fail and may make such necessary adjudication as it deems proper.

In view of the outcome of the Western Pacific reorganization and the outcome of the Denver & Rio Grande reorganization, nothing remained for the plaintiff corporation to do but to collect such assets as it had and distribute them to its stockholders. So the Attorney General of the State of Delaware filed a bill in equity in October, and on October 19 a receiver was appointed and was directed to take charge of the corporation's assets, and the order, which is part of the moving papers here, particularly specifies that he shall enter his appearance in this suit and prosecute it and select attorneys to represent the receiver, and he authorized us as attorneys for the plaintiff to appear in his behalf.

Rule 25(c) of the Rules of Civil Procedure provides, as your Honor knows, that——

“in case of any transfer of any interest, the action may be continued by or against the original party, unless the court upon motion directs the person [41] to whom the interest is transferred to be substituted in the action or joined with the original party.”

In other words, it seemed to us that we were in duty bound to advise the court before judgment

was entered, that the receiver had now taken over plaintiff's assets and to apply to this court, in its discretion, to either substitute the receiver or join the receiver as a party plaintiff. And it seems to us the record ought to fully disclose the real relationships of the parties in interest in this case. So what we have asked the court to do upon this motion is to make an order that Mr. Bayard as receiver shall be joined as a party plaintiff for all further purposes of the case. It seems to me to be a perfectly formal matter to get the right parties before the court.

Mr. Clark: The intervener has no objection to that motion.

The Court: Have you any objection to that?

Mr. Adams: Yes, I have, your Honor. I will state it very briefly. Rule 25(c) is a rule under which it is discretionary for the court to permit the joinder of a new party as transferee of the interest of a party. The rule follows state court practice, particularly that of New York and California. The rule is that the court is not required to take in the new party upon its application. It is entirely proper, in other words, under the practice and the rule for that litigation to go forward in the names of the parties to the litigation when [42] the fact, as in this case, is that the new party stands in the shoes of the original plaintiff, it doesn't seek to appear as a party having any different or individual interest different from that of the corporation itself, the plaintiff. Now, as I say, it is entirely dis-

cretionary with the court whether it shall make any order; but when the new party seeking to come in does not have a position in the litigation different from that of the transferor party, then the ordinary, and I think the best, practice, is for the court to order a substitution, if it is going to make any change, of the transferee in place of the transferor as a party. That has not been applied for here. This application is an application for the receiver to be an additional party. And we already have, as your Honor well knows, two spokesmen on the other side for the corporation's interests, and this is an effort to get a third.

Now we are somewhat apprehensive that while the receiver now appears through the corporation's own counsel, and thus indicates for the time being that his interest is the same as that of the corporation, that the fact may develop that for some reason he may take still an independent position. We don't know that.

Now may I say this: While it is entirely in the discretion of the court to act one way or the other where there is a transfer of interest, it is not clear upon the record [43] presented to your Honor with respect to the appointment of this receiver that this receiver is in fact the transferee of the corporation's interest.

It is a remarkable set of papers. When you take the set of papers and try to tally them with the Delaware law, you will find that the application for receiver refers to section 68 of the Delaware Cor-

poration Law as one of the grounds. That statute provides that upon the dissolution of a corporation a receiver may be appointed, but this set of papers shows that this plaintiff corporation has not yet been dissolved.

The application is also grounded upon the general equity practice of Delaware courts, and I wouldn't pretend to be familiar with the equity practice of the Delaware courts, but I do notice that the order of appointment of the receiver recites as its foundation that either the case is one for the appointment of a receiver under section 68, or, in the alternative, under the equity practice, so that your Honor cannot tell from these papers which it is.

It is the Delaware law that a receiver appointed *pendente lite* does not take title to the corporation's assets, and it would only be in case this receiver were one appointed under section 68 after dissolution of the plaintiff corporation, as I apprehend it, that this receiver would have title.

Now that is about all I want to say about this, except to [44] suggest to your Honor that, in view of the character of the papers presented at this time and in view of the immediate status of the litigation and the doubt as to whether this receiver is a proper party, perhaps the best thing to do would be to deny this application without prejudice, because there can be no possible prejudice from the denial, and wait until time develops that this receiver can show in fact that he is what section 25(c) requires, namely, the transferee of the interest of the corporation.

And I would like to say just one further word: that it will appear from the record upon the application that this receivership proceeding taken in Delaware was taken with the consent of plaintiff corporation; the receivership proceeding, in other words, was a friendly proceeding. I am not suggesting that there is any impropriety in a friendly proceeding, quite the contrary; but it is a significant fact that right intermediate between your Honor's decision of his case and the motions now before your Honor we are met with an application of this character and, as I see it, a somewhat dubious situation as to the title of the receiver.

Does your Honor wish to hear from me with regard to plaintiff's proposed findings?

The Court: Mr. Lasky has not presented those yet.

Mr. Lasky: With respect to this matter, if the court please, it seems to me that the position is somewhat captious. [45] Counsel criticizes and raises questions whether under the Delaware law a receiver should be appointed at this time or take title; but after all, the court must give due faith and credit to an order of the Delaware court, and the order of the Delaware court is quite specific. It commands the receiver to take over all the assets and to prosecute this suit. He is appointed and he has qualified. He now has command of the litigation, and whether he becomes a party of record or not, he is the real party in interest. If the court denied the motion he would be operating under the

name of the plaintiff. It seems to me that the records of the case ought clearly to show who is prosecuting it.

The danger that the receiver will take one position on appeal and the company plaintiff take another position has no merit because whatever position the receiver takes, there is nothing the plaintiff can do about it. The plaintiff has no funds that have not passed into the possession of the receiver.

Our experience has always been that when there has been a substitution or transfer of interest, that ought to be noted of record.

We had a rather sad experience some time ago in a case that was tried in this court, I think it was Bliss vs. Lowery.(?). We had a long battle and very parlous moments.

It seems to me the receiver ought to be made a party plaintiff, and it ought to be done rather than to substitute [46] him, so that there can be no doubt whatever of what is going on here.

It seems to me counsel has no point except he is fearful there may be another party represented by a new attorney, and he would have to answer three instead of two. Heretofore he hasn't had much trouble answering two instead of one.

We are going to continue to represent the receiver just as we have represented the plaintiff. If the receiver bounces us out, there will be no funds to continue us in and to present a third point of view.

I think the motion ought to be granted really as

a matter of routine. The form of order which we propose has been attached to the moving papers. Does the court have the papers in front of him?

The Court: Yes, I think they are all attached to the motion.

Mr. Lasky: In fact I think the plaintiff might have been subject to some criticism had it not called to the court's attention what had occurred.

The Court: The only thing that occurs to me is that in the form of order as you have prepared it, it is stated that "Bayard was appointed and now is the receiver of the plaintiff corporation to take charge of its estate and effects and to collect the debts and properties due and belonging to it with power to enter his appearance in and to prosecute and defend [47] in the name of said corporation or otherwise, all suits and proceedings which may be necessary or proper for the purpose aforesaid." If that is the case, how can the plaintiff remain in the case?

Mr. Lasky: Rule 25 (c) says the case may be continued in the name of the plaintiff or the new party may be substituted, or they both may be continued together. The only good reason why they both should be continued——

The Court: This motion is made both by the plaintiff and the receiver?

Mr. Lasky: Jointly.

The Court: Then he is your client?

Mr. Lasky: That is right. We appear as attorneys for both the receiver and the plaintiff, and we both ask that he be joined.

The Court: I don't see that there can be any harm in this, Mr. Adams. I am inclined to agree with Mr. Lasky, and I don't think you could have any more trouble than you have heretofore had. All right, I will grant it.

Mr. Lasky: Have you the form of order which was submitted?

The Court: I will sign the order.

Mr. Lasky: It brings us now to the matter of proposed findings, and in proposing findings we were very careful to heed the admonition of the opinion that proposed findings should not stray away from the basis of the opinion. And so if your [48] Honor has our proposed findings——

The Court: Yes.

Mr. Lasky: Proposed findings No. 1, as you see, adopts the opinion and its statement of facts as our proposed finding.

The Court: Let me interrupt you. Does the defendant object to all of your findings?

Mr. Lasky: Apparently to all of them.

The Court: All right.

Mr. Lasky: Every one of them.

Now our findings were to serve four purposes. One purpose your Honor has already ruled on.

The Court: Let me ask you another question, if I may. Has the defendant proposed any findings?

Mr. Adams: We have served, your Honor, and there is in the files our objections to the plaintiff's findings. We do not propose any, but we filed the objections to plaintiff's in which we have taken each one up in turn.

Mr. Lasky: As a matter of fact, counsel served us with a notice some time ago that they would not propose findings. That is correct, is it not?

Mr. Adams: That is correct.

Mr. Lasky: We waited until they had so advised us.

We had four purposes in mind with our proposed findings. One of them your Honor has already heard discussed, because it was the subject matter of Mr. Levy's remarks. [49]

The Court: I have been at law and motion from ten o'clock until about quarter to one, and I think the reporter ought to have about five minutes recess.

(Recess.)

Mr. Lasky: As I was saying before the recess, the purposes of our few findings are four-fold.

One of the purposes was in connection with the refund. We have discussed that, and that disposes of that.

There was one other main purpose, and that is this: Your Honor's opinion in major part, as we understand it, decided the case on the basis that the taxes ought to have been paid the government; that the settlement, to quote from the opinion, "invited a type of scrutiny that the court could not give it," and that if you were able to do so, you would set it aside. "The tax escape was erroneous and unjust." More of that quotation. And consequently, the court of equity would decline to intervene.

As has been indicated so far this afternoon, that

sounds on the principle that the court will not interfere between wrongdoers, or possibly like the doctrine of unclean hands.

So the first group of requested findings, three, four, five, six, seven and nine are directed to this. In essence, they go to the fact that the plaintiff is not in *pari delicto*; that the plaintiff did not itself conduct the tax transaction.

In their objections defendants' counsel have said that [50] these findings relate to the subject of duality, but they are not directed to duality at all. Your Honor has indicated your views with reference to duality in your opinion, and we say nothing about them. This merely goes to the point that the plaintiff itself did not conduct the tax operations, had nothing to do with them until the time of settlement, so that if there is some wrongdoing involved there we were not in *pari delicto* on it. The facts we present are all true. They cannot be contested on the grounds of accuracy, although counsel does in his objections.

We believe we are entitled to have those as part of a set of findings so the whole subject can be properly appraised above.

Counsel in his objections picks out some of these findings and says this, that or the other is untrue. I respectfully submit that the proposed findings are true.

In the court's opinion, the court finds and discusses the doctrine of the tax transaction, and we accept that finding for whatever it may be worth.

I do not know that we can profitably spend time going through these six or seven findings with respect to the detail. It does seem to me there was no dispute on the detail.

Another purpose of the proposed findings may be found in proposed finding No. 2.

It seemed to us, if the court please, that time [51] relationships may well be important. The court's opinion had some dates in it; other dates it did not have in it. For example, I do not think the date on which the claim for refund was filed was there, and it seemed to us it would be very convenient if those dates could be before the Appellate Court in quick, compact form. That is the purpose of proposed finding No. 2.

The fourth purpose of the findings was perhaps to correct certain respects in which it seemed to us the opinion was inadvertently erroneous.

For example, there is the statement that the claim for refund was withdrawn. Actually it was not withdrawn. It was rejected by the government and no suit was brought thereon.

The Court: Well, I suppose I considered the two which you have mentioned more or less synonymous because of the fact that that was part of the arrangement of settlement. As I understood, the evidence was that, whether the claim was rejected or abandoned, it was not allowed, and the returns for 1943 and 1944 were allowed. So if you wish to substitute some other language in that that is more accurate, that will be all right.

Mr. Lasky: That was in fact covered in proposed finding No. 8 which takes up the settlement in precisely the form in which it occurred.

The Court: Where do you take that from? What part of the [52] record does that finding No. 8 come from?

Mr. Lasky: Proposed finding 8?

The Court: Yes.

Mr. Lasky: The exhibits show what was done. There was a letter written to the Commissioner and there was a letter in reply.

The Court: You took it directly from the letter?

Mr. Lasky: That is right. There is nothing showing that the Secretary of the Treasury ever approved, and the fact that the statute of limitations ran and the date is shown by a letter written by Mr. Polk which is in the file. It is referred to in our brief. As a matter of fact, it is stated that the statute ran by such and such a date. It seemed to us that those facts could well be stated in compact form.

Those were the several purposes of the findings, but the principal purpose, as I have said, would be to show that the tax settlement was conducted by defendants' tax counsel, so that the plaintiff itself, if there were any impropriety, if there were wrongdoing, if this doctrine of unclean hands applies, then we do not come in; we were not in *pari delicto*.

I think all the facts here are correct. Counsel has picked out some of these facts, and I am prepared to proceed with them in whatever way your

Honor thinks is appropriate to take care of them or just to submit them.

The Court: As to No. 10, I was not attempting to find why the Bureau did it; I just simply said that I did not think [53] it was right, that was all.

Mr. Lasky: Frankly, our purpose was this——

The Court: I don't know what motives the Bureau of Internal Revenue had.

Mr. Lasky: Here is a specific finding that there was no fraud. Of course we disagree with the conclusions your Honor arrived at. And unless there was fraud, we do not see how the court should decline to determine the equities in this case on the ground that the tax belonged to the government, the Internal Revenue Department, if the government had all the facts before it. Certainly counsel for the defendant agreed that all the facts were before the government, and the finding that they substitute for No. 10 is perfectly agreeable to us.

The Court: There is a substitute for No. 10?

Mr. Lasky: Yes, counsel has criticized these findings and has proposed some substitutes, and the one proposed for No. 10, so far as we are concerned, is just as good as No. 10 itself. He proposes for No. 10:

“The evidence discloses that the Bureau of Internal Revenue was informed as to all pertinent facts in connection with its consideration of the tax settlement and there is no evidence that the Bureau was in any way deceived or misled.”

The Court: Do you want me to make that as a finding? [54]

Mr. Lasky: I would be glad to have that as a finding.

The Court: There is no evidence in this case at all concerning that matter. I am not going to make any finding about what the Bureau of Internal Revenue did concerning this matter. The only evidence before me in this case was the documents concerning this settlement.

Mr. Lasky: We have stated it the other way.

The Court: There was some evidence by the attorney of the fact that he had conferences with them, in his report, in the letters which he wrote, but I do not feel that it is incumbent upon me to make any finding. I am not passing on whether the Bureau had all the information in front of it or whether they were deceived or misled or not. My holding in the case is that these taxes were owing to the United States and they should have been paid, and I think the decision of the Bureau was wrong, and that is all I said in my opinion. And I did say that I think it should be scrutinized further, but the conclusion I came to was that, under the statute or any pertinent regulations, that the Bureau of Internal Revenue was entirely wrong in approving this settlement.

Mr. Lasky: Then proposed finding 10, as we——

The Court: I only said that in connection with discussing the equities, the principles which would apply in fairly determining this litigation. I do not feel that I would want to make any finding on that subject at all. [55]

Mr. Lasky: That is why our proposed finding, I thought, was better than their substitute. Their substitute asked for an affirmative finding that the evidence shows disclosure. Our proposition was simply that it did not disclose any fraud, and it certainly does not.

The Court: No, but that isn't an issue in the case.

Mr. Lasky: It seemed to us that it became related to the basis of the opinion.

The Court: It is sort of insinuated into it.

Mr. Lasky: Yes, the unclean hands doctrine, parties to a wrong, the court would not interfere because the taxes should have gone to the government and they have not; it invited a kind of scrutiny the court could not give it. The implication was that there may have been something wrong about it, consequently this court would have nothing to do with the situation. That is certainly the implication we got out here. If that is so, certainly the evidence did not disclose it, and the evidence certainly discloses that the tax operations, however they may be characterized, were conducted by the defendant and its tax counsel, not by the plaintiff.

The Court: There is no question about that.

Mr. Lasky: And that is the whole purport of the findings. Let me take them up again.

Proposed finding No. 1 adapts the court's opinion.

Proposed finding No. 2 states those dates merely for [56] convenience.

Proposed findings 3, 4, 5, 6, 7 and 9 have to do

with what your Honor stated the evidence clearly shows, and proposed finding No. 8 had to do with the way and the nature in which the settlement was carried out with the government, which we took directly from documents.

As for any details of language——

The Court: I see that counsel for the defendant rephrased every one except the first.

Mr. Lasky: Yes. In doing so——

The Court: Do you object to his form?

Mr. Lasky: Yes, because it is not rephrased at all. What he has done is to say, "Your finding ought to be rephrased," and he has gone off on a different subject and repeatedly finds what your Honor in your opinion has held to be otherwise.

The Court: Let's see.

Mr. Lasky: I am prepared to submit our phrasing and counsel's phrasing and let your Honor determine that as you see fit, because I think it is rather unprofitable to stand in a court room and kind of bicker around about whether there should be one word or another. Your Honor is thoroughly familiar with the law.

The Court: I just want it clear, Mr. Lasky, your purpose in these findings is not in connection with the issue of duality [57] but for the purpose of having a finding in the record as to the non-participation of the plaintiff in the so-called tax settlement.

Mr. Lasky: To sum it up briefly, correct. You expressed your views on duality in the opinion and we are not trying to alter or touch that subject at all.

The Court: Why couldn't one finding be sufficient to cover that, then; that the court finds that in the preparation of the documents, in the conferences and in all matters having to do with the settlement arranged with the Bureau of Internal Revenue, the plaintiff did not participate? Couldn't you simplify that by making one finding?

Mr. Lasky: Possibly we could do so.

The Court: I mean, if that is your sole objective there.

Mr. Lasky: Your Honor's opinion of course also referred to the signing of various papers by the plaintiff's president. Of course Mr. Curry was the plaintiff's president, and our point here was that while he signed them, that really was not the plaintiff's act.

The Court: Didn't I say too the Board of Directors were not——

Mr. Lasky: I think you may have said it with respect to some matters but not others. I don't think it was said with respect to the power of attorney.

The Court: I see. [58]

Mr. Lasky: Perhaps I can suggest this to the court: The court knows what our point here was. Perhaps we could just leave it with the court to phrase it in a way you think appropriate.

The Court: Can you come to some agreement as to what form you want the findings in? In other words, would it be satisfactory to both sides if the court were simply to say the opinion, insofar as

it states any factual matters, constitutes a finding of fact, and, in addition, the court finds as a fact that the plaintiff corporation did not participate in the matters that we have just referred to? Would that be sufficient?

Mr. Lasky: On those dates, I think. It might be convenient to include dates.

The Court: Is there any dispute about that No. 2 finding?

Mr. Adams: Does your Honor wish to hear from me?

The Court: Yes, I was just wondering whether we couldn't shorten the matter by having some comment.

Mr. Adams: I would like to make one or two general comments.

In the first place, your Honor's opinion stands as findings under the rule. Of course there is no technical requirement of any further order from this court; the opinion shall stand as findings.

Your Honor in his opinion stated, however, that if the [59] parties desired, they might present findings upon the essential equitable considerations upon which the decision is based. These findings are not of that character. They do not deal with any of the essential equitable considerations, and, as we view it, as we think, contrary to what Mr. Lasky's impression of the matter is, that these findings have to do with duality of control and nothing else.

Mr. Lasky, however, suggests they may also have

to do with the extent of participation of the plaintiff corporation in the tax transactions with the government. That idea had not occurred to me, and I would like to respond very briefly to it, and respond to the text of the finding that he proposes so as to show your Honor the characteristic objection we have to the proposed finding in that regard.

The plaintiff's proposed finding No. 2 is a finding that the returns for the first four months of 1944 and the claim for refund were filed by the defendant, meaning of course the reorganized railroad company. Of course the fact is, and there is no dispute about it, that the returns and the refund claim were filed, as the law required, by the plaintiff as the parent corporation in the affiliated tax group and signed by the plaintiff's president. But what plaintiff's counsel have in mind is their assertion that that conduct was in fact the conduct of the defendants through duality and not otherwise. Then it is further—— [60]

The Court: Didn't I make a statement in the opinion that the returns were filed by the tax counsel?

Mr. Adams: Your Honor, I would like to address myself to that particular point, because I believe your Honor did say so.

I would like to recall to the court's mind that as early as the year 1946 when this litigation first began—and, in fact, before this lawsuit was filed out here,—the plaintiff corporation was fully advised that Mr. Polk, who was tax counsel, was acting

as tax counsel for the affiliated group of taxpayers in presenting the matter to the government, and ever since the very beginning and prior to the initiation of this litigation, that has been the understanding of the plaintiff, that Mr. Polk was acting vis-a-vis the government for the account of whomsoever made objections.

I would like to direct your Honor's attention to defendant's exhibit 30A, which is a letter addressed to Mr. Polk's firm under date of September 27, 1946, which contains this statement:

"Appreciating that your firm has acted as tax counsel for both the company and the corporation in the filing of the consolidated tax returns and in the proceedings pending before the Internal Revenue Department, we would of course not wish to take any steps which would in any way prejudice the claims [61] made in those returns."

I would like to ask counsel if I may borrow the transcript of the hearing before his Honor in August, 1947, the first half.

(The transcript was handed to Mr. Adams.)

Mr. Adams: Thank you very much.

Mr. Levy: I have no further use for it.

Mr. Adams: I am just going to read very briefly from a statement by plaintiff's counsel at page 26 of the record there. Mr. Goodrich said—this your Honor will bear in mind was in 1947:

"May I correct that briefly, Mr. Levy? My understanding is that an offer of settlement on behalf of the group of corporations was made by

the government to Mr. Polk, who was acting as tax counsel for the entire group, and had been for some time previously.”

From the record, your Honor, in this case, there is no doubt but what it was thoroughly understood by the plaintiff corporation ably represented by counsel at the time, that Mr. Polk’s position was that of one holding powers of attorney from all the members of the affiliated group in dealing with the United States government in that capacity. So that for plaintiff at this time to now suggest that what Mr. Polk did was not done for plaintiff corporation but only for defendant reorganized railroad company is shown by the record to be [62] mistaken.

I should state—I think I did, perhaps,—that the letter to Mr. Polk’s firm, the one from which I read, exhibit 37A, was addressed to his firm by Mr. Curry, the president of the corporation, but at the time with the advice of counsel who were then representing the corporation, actually looking towards the filing of the litigation in this controversy, which was filed in October, the next month.

Your Honor, we have filed objections to plaintiff’s findings which are referred to by counsel as picking at their findings. I don’t want to take your Honor’s time to run over these specific objections.

The Court: You do not ask that the court make any special findings?

Mr. Adams: Your Honor, we came to the conclusion that no findings were required and so notified

counsel, under the arrangement which was that we had some time to propose findings if we thought any were necessary. We gave them notice that we proposed none. They then had time within which to propose findings. We consider that none are necessary. We consider that those proposed are not within the direction of the court as to the findings that might be tendered.

The Court: I was not attempting to state to counsel that—I will put it this way: I do not think the court has the power to say, “I won’t make findings.” The court under [63] the law must make findings. However, the rule does provide that the court can include the findings in an opinion, although perhaps—and this is what I wasn’t too sure about, and I mean I think counsel should have an opportunity to make their own decision in that regard. I did not separately state findings in the opinion, although I think the opinion is perfectly sufficient to indicate the findings on factual matters upon which the decision rested. So that is why I put in the opinion that if counsel felt that findings should be set up some special way, that I didn’t want counsel to think that I was saying that, “I am not going to make any findings in the case,” because the court has a duty to make findings; it is just that I thought that what was in the opinion was sufficient unless counsel thought otherwise.

Mr. Lasky: I felt in major part it was sufficient. There are only a few things that we thought ought to be added to it.

The Court: Don't you think that most everything you have mentioned is really in the opinion some place or another? You are right, perhaps in proposing it in orderly concise form.

Mr. Lasky: I doubt it, if your Honor please. I made a careful study of it.

For example, your Honor did find that their claim for refund was filed in the name of the plaintiff, but you did not [64] state who did it or how it was done. When you spoke of the returns, you said they were filed by defendants or defendants' tax counsel.

The second sentence in finding No. 2 was designed to treat the claim for refund in the same way your Honor had treated the filing of the previous returns. I think we treat the power of attorney in the same way.

Your Honor had spoken rather indiscriminately of the filing by the debtor, and we thought that it became the debtor after a certain date. That is the whole purpose of finding No. 2.

It may well be—I think your Honor's suggestion of a while ago about a finding about participation in major part covers everything that we have in mind. If we could have finding No. 2, the finding your Honor suggested, and finding No. 8, I think that perhaps covers it, together with finding No. 10, your Honor, that the evidence disclosed no fraud committed by defendants' tax counsel on the Bureau of Internal Revenue. I know that the defendants do not object to such a finding. I can't see why they would.

The Court: You say finding No. 2?

Mr. Lasky: Finding No. 2.

The Court: Except that your opponent objects to the second sentence, I notice.

Mr. Lasky: That objection, I submit, has no merit, [65] because all we have done there is to treat the claim for refund in the same manner as your Honor in the opinion has treated the filing of the tax returns. Your Honor found the tax returns were filed by the defendants but you did not mention who filed the claim for refund, although you said in your opinion that it was filed in the name of the plaintiff. We felt that that ought to be treated in the same manner as the tax returns.

The Court: Your opponent is not satisfied with just your language that they were filed by the defendants, filed by the debtor. I suppose that assumes nothing more than the presentation of the document to the government.

Mr. Lasky: We certainly intended more than that. We meant the preparation of it, the whole task, the job of getting it ready and submitting it to the government, and it is certainly true in the same sense as it was true when your Honor put in as to the returns.

The Court: You are satisfied with No. 2 and with the general finding we have discussed about non-participation?

Mr. Lasky: Yes, your Honor.

The Court: What was the other one?

Mr. Lasky: The other one, I think, would be

that finding No. 8 ought to be there, and I am hopeful of something in the nature of finding No. 10.

The Court: I do not understand the purpose of that [66] No. 8. What has that got to do with the case?

Mr. Lasky: Finding No. 8, if your Honor please, is related to our argument we made earlier today upon the refund.

Your Honor disposed of our request for No. 7 by saying, "Well, the stipulation is in the record and the pre-trial order is in the record." And so they are. But the facts stated in No. 8 are not succinctly in the record, and it seems to us they could well be succinctly stated.

The Court: What is meant by the statement here that "The settlement with the Bureau of Internal Revenue was not entered into in the manner prescribed by section 3761 of the Internal Revenue Code"?

Mr. Lasky: This is what I meant by it: The only kind of a settlement which the law allows which is binding upon the government and upon a party so neither can break it is one which has been approved by the Secretary of the Treasury. There was no such settlement here. This was a letter written to the Commissioner asking a refund and the Commissioner rejects the refund. This merely fails to levy the deficiency assessment. If the Commissioner so desired to levy the deficiency assessment, he could have done it and he would not be

barred by this letter. If the plaintiff had filed a claim for refund, it would not have been barred by virtue of this letter. It never was carried out by him in the manner required by law.

Mr. Adams: That I disagree with. [67]

The Court: The Secretary of the Treasury does not have to approve every tax refund claim that is filed.

Mr. Lasky: Yes, your Honor, any settlement must be approved by the Secretary of the Treasury or it is not binding. That very matter was decided by the Supreme Court in the case of Botany Worsted Mills vs. U. S., 278 U. S. 282. Unless the Secretary of the Treasury, or I think counsel for the Treasury, approves in writing, that is not a binding settlement, either party can escape from it. And that is the final proof in this case, that that settlement never went through in the manner prescribed by law.

Mr. Adams: I would like to answer that.

Mr. Lasky: It was effective only because neither party did anything further. Plaintiff did not sue for a refund; the government did not levy any deficiency assessment, and the settlement became effective only because the statute of limitations ran against the parties doing anything more.

Mr. Adams: Your Honor—

Mr. Lasky: Let me complete my thought. The evidence shows just how the settlement was made. A letter was written to the Commissioner. The Commissioner replied. It does not show that the Secretary of the Treasury approved that in the manner

required by section 3761 of the Code, and the case of Botany Worsted Mills vs. United States, 278 U. S. 282 holds that the only way a settlement can be made is in the manner [68] required by that section.

The Court: What is the importance of my making a finding in this case as to whether or not the settlement did not go through in the manner prescribed by the Code?

Mr. Lasky: It bears upon our right to the refund. We claim in fact a kind of an estoppel. Had it not been for the pre-trial stipulation that it should be deemed that this money had been refunded to the plaintiff, we would have been in a position up until a week or two before your Honor's opinion to have sued on that claim for refund. We did not. No such suit was ever filed, because we were relying upon the stipulation. Maybe our arguments as to the conclusions we contend for are not sound, but certainly we propose to make those arguments and the facts are there.

The Court: Mr. Lasky, what question would you be precluded from raising treating the opinion as findings of fact in this case in the higher court that this particular finding as you suggest would permit you to raise? I am not clear on that point.

Mr. Lasky: Your Honor is referring to finding No. 8?

The Court: No, all these findings. Can't you raise anything that you suggested here today as a mistake or error of law on the part of this court

that you have talked about today treating the opinion as a finding of fact?

Mr. Lasky: I think, your Honor, that since all the facts [69] we are speaking of are undisputed, whether your Honor found or not, we could search the record and find them. The question I am talking about is a practical problem. If certain facts are so, it makes it convenient and within the financial reach of the plaintiff to get them before the court in the form of findings rather than to dig up that record.

The Court: The trouble with that is that counsel always says, "These are the undisputed facts." And the other fellow gets up and says, "No"; then we spend long hours in trying to work out some language in the findings.

Of course there can't be any objection to those dates; but that one sentence does not save you any time or there isn't any expense involved in the matter. You could state that in your appeal brief and your opponent is not going to dispute that the consolidated returns and so forth were filed on those respective dates, May 15, July 15, June 15 and March 9.

Mr. Lasky: We don't know whether they would or not. If we want to write a brief we want to be able to quote for every sentence we put in our brief a reference to something. If we do not have it in the form of a finding, then we have got to refer to some document.

The Court: I could append that to my opinion,

put those dates in. As to those other matters, I do not think there is any question there that makes any great difference as far as [70] the record on appeal is concerned or your raising these questions.

Mr. Lasky: Well, perhaps the way it can be handled is to take our finding 2, the dates, append them to your opinion, together with the statement along the lines that your Honor mentioned before about participation in the tax operations, and that does it. I do agree that the dates that we have here should be appended to the opinion.

The Court: Suppose I look over this and see whether there is any serious omission here that I think should be corrected, so that you won't have to incur too much expense in printing something, and digging it out of the record yourself, I don't think there is very much to this, Mr. Lasky, but I will look through it to be sure.

Mr. Lasky: Very well, we will be very happy——

The Court: There can't be very much from what I have read of these proposed findings.

Mr. Lasky: We have tried to cut it to the bone in what we have submitted here.

The Court: The only thing is I like to do this work, but I think somebody ought to have prepared a form of findings, and you have to have a judgment in the case. There has to be a written judgment so that the other side can appeal. I will write it out if nobody else wants to do it.

Mr. Lasky: Of course we would be glad to do it.

The Court: A form of judgment should be prepared which recites that the court has set forth all

the findings of fact necessary for the decision in the opinion.

Mr. Lasky: Couldn't there be a form of findings which merely recites, Finding 1, the court adopts the opinion as rendered; Finding No. 2, such other findings as your Honor sees fit and you will have a set of possibly three findings. Then we have a formal document and we know when the time starts to run.

The Court: I don't like to be placed on the spot. Perhaps I had better do it myself.

Mr. Adams: Your Honor will bear in mind that the successful party will be quite willing to undertake the preparation of the necessary documents. I suppose that would be in order when the time comes for the preparation of it.

The Court: I would like to sign the findings and judgment and get through with this.

Mr. Adams: Yes.

The Court: It has been pending a considerable length of time. You can't tell when one of these cable cars might knock me down.

Mr. Adams: May I make this suggestion, your Honor: that the argument has now resolved itself down to whether or not your Honor shall append some dates. Your Honor decided, I take it, this afternoon that he was not going to make [72] a finding like No. 10?

The Court: No, I won't give that finding.

Mr. Adams: That is settled.

As regards finding No. 8, I take it a finding of

that character would be quite out of order for the reasons your Honor stated; and not only that, but it is not supported by the record and we think contains a misstatement of fact as to the date on which the statute of limitations expired. Certainly there is an attempt to make a finding on a matter that was never brought up before your Honor on the trial.

I suppose the point we have reached is whether or not the court is going to make a finding of some dates mentioned in No. 2. That seems to me to be utterly unnecessary. Those are settled dates.

Mr. Lasky: Then there should be no objection.

Mr. Adams: Nobody has ever quarreled about them. The objection is that it is merely finding something that the record shows beyond peradventure and it can be stated without possible argument.

The Court: Would you submit the two findings that you desire, the finding on the dates and the finding that you did not participate in the tax refund operations?

Mr. Lasky: I will endeavor to do so. I am leaving for Chicago at 7:00 o'clock in the morning to be gone for two weeks. [73]

The Court: I will prepare it myself.

Mr. Adams: Your Honor, could I say one word, not indulging too much on your Honor's time? You will understand, of course, frankly, in my judgment, any finding which he seeks discriminating between the one party and the other in its participation in the transactions with the government is utterly out of keeping with the record. The record shows upon

this point that the parties, if there were any controversy, willingly—I say willingly—agreeably to both parties, Mr. Polk continued to transact the tax business with the government for the account of whoever might be concerned. And under those circumstances I do not see how it can be said that the one party as against the other was any more or less involved in the negotiations with the government. I read your Honor the record on that, and the record shows that beyond the possibility of a doubt.

The Court: Of course after the litigation started something seems to have been overlooked in connection with the settlement with the government until after the trial.

Mr. Adams: The record here shows that plaintiff considered the withdrawal of Mr. Polk's power of attorney before that settlement came to the point where the letters were exchanged. All that record is before your Honor. The plaintiff corporation could have asked Mr. Polk to protest that settlement or it could have withdrawn his power of attorney, [74] so clearly Polk was representing every member of the affiliated group as it appears by his signatures in his relations with the government. I do not think this record could possibly be construed in any other way.

Mr. Lasky: I think the court is thoroughly familiar with what went on. I think nothing is gained by chewing that over again further.

The Court: No, I think perhaps not. I will

make up some kind of an order in this matter myself, gentlemen, and will have the clerk send you copies.

Mr. Adams: In that case will your Honor desire that either party be designated to prepare the form of judgment?

The Court: As long as I am doing it, it is very simple; I will draw that up, sign it and file it myself. The clerk can send you copies of it. Then if you wish to reargue any of these matters on a motion for a new trial, you have that right.

Certificate of Reporter

I, W. A. Foster, Official Reporter, certify that the foregoing 75 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ W. A. FOSTER.

[Endorsed]: Filed Dec. 29, 1949. [75]

In the Southern Division of the United States
District Court for the Northern District of
California

No. 26,508-G

THE WESTERN PACIFIC RAILROAD COR-
PORATION,

Plaintiff,

and

RUSSELL M. VAN KIRK, HENRY OFFER-
MAN, and J. F. FARLEE & CO., INC., a
Corporation,

Intervenors,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY, et al.,

Defendants.

Before: Hon. Louis E. Goodman,
Judge.

REPORTER'S TRANSCRIPT

Tuesday, February 1, 1949

Appearances:

MESSRS. BROBECK, PHLEGER &
HARRISON, by

HERMAN PHLEGER, ESQ., and

MOSES LASKY, ESQ.;

LEROY GOODRICH, ESQ.;

MAHLON DICKERSON, ESQ.;

A. PERRY OSBORN, ESQ.;

F. J. NICODEMUS, JR., ESQ., and

NORRIS DARRELL, ESQ.,

For the Plaintiff.

MESSRS. ROGERS & CLARK, by

WEBSTER V. CLARK, ESQ.;

JULES LEVY, ESQ., and

DAVID FRIEDENRICH, ESQ.,

For the Interveners. [1*]

* * *

The Court: It is your theory that if the parent company, absent any question of so-called duality or lack of representation, had joined in a consolidated return without any agreement as to the interest it might have in any recovery, that the law and equity would step in and say there was a right to participate?

Mr. Clark: That may or may not be so, your Honor, but if that had been posed at the proper time, may it please the Court, it is our belief that the theory of the tax statutes and the theory of equity under the circumstances of this case would have entitled the parent corporation to at least that portion of the savings which directly flowed

* Page numbering appearing at top of page of original Reporter's Transcript.

from the use of its stock loss which made those savings possible. Now, without commenting on the assertion of the basic right at this time, may it please the Court, this thing that we have called the duality does no more than to allow your Honor to look at the transaction as it existed at that time, and if you find it unfair, you have a right to right that wrong.

The Court: You say "unfair." You do not mean the transaction of filing a consolidated return?

Mr. Clark: Not with respect to the Government, your Honor, but I do say this: that where a parent corporation is caused to file a consolidated return, in those years, it having the election to have filed a separate return if it wanted to, and where in that return there is set up the parent's loss in the stock of the [17] subsidiary as an offset against subsidiary's income, thus saving subsidiary some \$21,000,000, we say, may it please your Honor, that the result in this case to date, namely, that the parent, who had the election to file the consolidated return and whose loss made the saving possible, gets not one penny of the transaction and the railroad claims it all, we say that is an unfair result.

The Court: What you are saying is really that the unfairness consists of depriving the holding company of participation in the fruits of the consolidated return.

Mr. Clark: Right.

The Court: You are not complaining that the procedure of filing the consolidated return was unfair?

Mr. Clark: No, your Honor. It is the failure to recognize the right of the parent in the result of having filed the consolidated return in which the parent's stock loss of \$75,000,000 was set up as an offset, and which resulted in the saving to the railroad company.

The Court: Then it does come back to what I asked you just a moment ago, that irrespective of any question of so-called duality or lack of representation upon the parent company, that there is a contention on your part that where the holding company does participate, no matter what the circumstances of the filing of the consolidated return, that there is in law an obligation of some kind to share the fruits? [18]

Mr. Clark: Right. [19]

* * *

Mr. Phleger: The first item, your Honor, is the tax return. I will first offer in evidence the corporation income and declared value excess profits tax returns for the calendar year 1942 of the Western Pacific Railroad Corporation, which I ask be marked Plaintiff's Exhibit 3-A. [61]

* * *

The Court: We will proceed on the theory that as the exhibits are offered they will be admitted unless there is an objection as to materiality.

Mr. Phleger: The first exhibit, Plaintiff's Ex-

hibit 3-A, is also identified as Interveners' Exhibit 188.

(The income tax return referred to was marked Plaintiff's Exhibit 3-A.)

Mr. Phleger: I will now offer, and request that it be marked Plaintiff's Exhibit 3-B, the corporation excess profits tax return for the calendar year 1942 of the Western Pacific Railroad Corporation, the plaintiff. That is also identified as Interveners' Exhibit 187. [63]

* * *

(The document referred to was marked Plaintiff's Exhibit 3-B.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 4-A, identified also as Interveners' Exhibit 190, the corporation income and declared value excess profits tax return of the Western Pacific Railroad Corporation for the calendar year 1943, which I ask be marked Plaintiff's Exhibit 4-A. [69]

* * *

(The documents referred to were marked Plaintiff's Exhibits 4-A and 4-B respectively.)

* * *

Mr. Phleger: I have here the returns for the corporation for the year 1944, which includes the returns of the subsidiary corporations for the first four months, a separate return having been filed by the Western Pacific Railroad Company, the subsidiary, together with its affiliates for the last eight months. These returns were filed on June 15, 1945, which is some six months after the property came out of the bankruptcy court. I will ask that the

income tax return for the year 1944, the Western Pacific Railroad Corporation, identified as intervenor's 192, be received and marked Plaintiff's Exhibit 5-A, and that the excess profits tax return for the same year, identified as intervenor's 191, be received and marked Plaintiff's Exhibit 5-B.

(Whereupon income tax return for year 1944 and excess profits tax return for 1944 were received in evidence and marked respectively Plaintiff's Exhibits 5-A and 5-B.) [72]

* * *

I now offer in evidence the claim for refund of the Western Pacific Railroad Corporation, covering taxes paid during the calendar year 1942. It is identified as intervenor's exhibit 193. I ask that it be marked Plaintiff's Exhibit No. 6.

(Whereupon claim for refund, 1942, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 6.) [75]

* * *

I will now ask that there be received in evidence and marked Plaintiff's Exhibit 7, a copy of the stipulation filed in this Court on September 5, 1947, entitled "Stipulation and Agreement between Plaintiff and Defendants relating to Agreement with the Bureau of Internal Revenue." That, may it please the Court, is [76] the stipulation which was the subject of some discussion this morning.

Mr. Adams: May the record show, too, that there

was an order entered by the Court upon that stipulation?

Mr. Clark: Yes, there was a pre-trial order requiring that stipulation be filed, your Honor.

(Whereupon copy of stipulation filed September 5, 1947, referred to above, was received in evidence and marked Plaintiff's Exhibit No. 7.) [77]

* * *

Mr. Phleger: I will now read into the record the admissions of the defendants to plaintiff's request No. 2: "That from 1916 to April 30—," and this is the request No. 2, your Honor— "—1944, the corporation owned all the stock, both preferred and common, of the company." The subsidiary company's response admits that "from some date in 1916 to April 30, 1944, the plaintiff owned all the stock, both preferred and common, of the debtor in reorganization." The response of the Western Realty Company is: "admits that's from some date in 1916 to April 30, 1944, plaintiff owned all the stock of the debtor in reorganization except directors' qualifying shares." [75]

I will now offer in evidence paragraph 2 of page 3 of the defendant's brief as an admission:

"Plaintiff, herein called the holding company, was organized under the laws of the State of Delaware on June 29, 1916. It acquired and held the capital stock of the Western Pacific Railroad Company up to May 1, 1944. On that date the stock was transferred to the reorganization committee."

I will now offer the admissions of plaintiff's request No. 3. The request reads (reading):

"In 1935 the company went into bankruptcy under section 77 of the bankruptcy act in proceedings in the United States District Court for the Northern District of California, hereinafter referred to as the bankruptcy court, before Judge A. F. St. Sure, entitled 'In the Matter of the Western Pacific Railroad Company, Debtor, No. 26591S,' and it was placed by the court in the hands of the trustees in that year."

The response of the subsidiary company is (reading):

"Admit that on August 2, 1935, the debtor in reorganization filed a petition under section 77 of the bankruptcy act in the United States District Court for the Northern District of California and that all of the assets and property of the debtor in reorganization were vested in reorganization trustees on or about November 9, 1935."

The response of Western Realty is in substance the same. I [80] take it you won't require us to read it.

Mr. Adams: No.

Mr. Phleger: I will now direct the attention of the Court to the plan of reorganization of the subsidiary company. I will not offer it in evidence, because I take it that the Court may refer to it without it being placed in evidence, and we don't wish to unduly burden the files. That is recorded in 233 ICC at page 409, and is dated June 21, 1939. It contains the following statement and finding:

“The capital stock of the debtor is found to be without equity or value and the stockholders shall not be entitled to participate in the plan.”

I will now offer in evidence as Plaintiff's Exhibit 8 a copy of the order of the court, of the bankruptcy court, in the matter of the Western Pacific Railroad Company, approving the plan of reorganization for debtor. It is dated August 15, 1940, and contains the following finding, which is shown on page 5 of the exhibit (reading):

“Fourth: The finding of the Interstate Commerce Commission, at the time of the finding, the interests of unsecured creditors of the debtor and the equity of the holders of the debtor's preferred stock and the debtor's common stock have no value and that the holders of such unsecured claims and such shareholders are not entitled to participate in the distribution of new capital securities or other assets of the [81] debtor under said plan of reorganization is hereby affirmed, and said plan of reorganization shall not be submitted to said unsecured creditors or shareholders for acceptance or rejection.”

(Whereupon copy of order approving plan of reorganization for debtor referred to above was received in evidence and marked Plaintiff's Exhibit No. 8.)

* * *

Mr. Phleger: I will now offer in evidence as Plaintiff's [82] Exhibit 9 the opinion of the Court, the United States Circuit Court of Appeals for the

Ninth Circuit, the foregoing order was reversed, but on March 15, 1943, the United States Supreme Court reversed the Circuit Court of Appeals and affirmed the order of the District Court. *Ecker v. Western Pacific Railroad Company*, 318 U. S. 449."

* * *

I will now offer as Plaintiff's Exhibit 10 the order of the bankruptcy court, dated October 11, 1943, confirming the plan of reorganization. The decision of the Supreme Court that [83] I mentioned is March 15, '43, this order confirming the plan is October 11. This order confirmed the plan of reorganization as proposed by the Interstate Commerce Commission, and appointed a reorganization committee. I will read the language in paragraph second of the order (reading):

"Second: The designation of Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson as members of the reorganization committee provided for in article R of said plan of reorganization is hereby approved."

Ask that this be received as Plaintiff's Exhibit 10.

(Whereupon order confirming plan of reorganization referred to above was received in evidence and marked Plaintiff's Exhibit No. 10.) [84]

Mr. Phleger: I will now offer as Plaintiff's Exhibit 11 a copy of the agreement between the Western Pacific Railroad Corporation, the plaintiff corporation, the Chase National Bank of the

City of New York, the Central Hanover Bank and Trust Company, the James Foundation of New York and Frederick H. Ecker, Frank C. Wright, and Robert E. Coulson, as the reorganization committee of the Western Pacific Railroad Company. That agreement is dated November 22, 1943. [85]

* * *

Mr. Phleger: Yes, this is a copy of the executed agreement. The agreement is executed in behalf of the Western Pacific Railroad Corporation by M. J. Curry, President; attest, John F. Wienken, Secretary, The Chase National Bank of the City of New York, by W. Arthur Grotz, Second Vice President; attest, William Morhmann, Central Hanover Bank and Trust Company [86] by R. G. Coombe, Vice President; attest, C. F. Parker, Jr., Assistant Secretary, James Foundation of New York, Inc., by William W. Carman, President; attest, Charles E. Andrews, Assistant Secretary; Reorganization Committee of the Western Pacific Railroad Company, by F. H. Ecker, Frank C. Wright and Robert E. Coulson. [87]

* * *

(The agreement referred to was marked Plaintiff's Exhibit 11.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 12 a petition filed in the bankruptcy court under date of August 23, 1944, by Whitman, Ransom, Coulson & Goetz and Pillsbury, Madison & Sutro as counsel for the petitioners, the petition of

the reorganization committee for an order approving the use of the debtor company in carrying out and making effective the plan approving the proposed amendments to the articles of incorporation and proposed new by-laws, and approving forms of preferred and common stock certificates and directing action with reference thereto. I will read three paragraphs. [88]

* * *

Mr. Phleger: I will now offer an order of the Bankruptcy Court filed on September 25, 1944, approving the use of the debtor company in carrying out and making effective the plan, approving proposed amendments to the articles of incorporation and proposed new by-laws of debtor company and approving forms of preferred and common stock certificates and directing action with respect thereto, and I ask that it be marked Plaintiff's Exhibit 13.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 13.)

* * *

Mr. Phleger: I will now offer in evidence as Plaintiff's Exhibit 14 the order of the Bankruptcy Court, which we call the revesting order dated November 27, 1944, order directing the revesting of properties of the debtor in the debtor company, fixing the date for consummation of the plan and authorizing and directing the carrying out of the plan.

Attached to the order and referred to therein are copies of the proposed form of deed of convey-

ance from the trustees to the company, and also a form of assumption agreement.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 14.)

Mr. Phleger: I now will offer defendants' admission to plaintiff's request 9:

"Pursuant to an order made and entered by the Bankruptcy Court on November 27, 1944, entitled, 'Order Directing the Revesting of Properties of the Debtor in the Debtor Company, fixing the Date for Consummation of the Plan and Authorizing and Directing the Carrying out of the Plan,' the reorganization trustees on December 29, 1944, transferred to the company all of the property vested in, possessed, held or used or controlled by the reorganization trustees."

The responses admit the facts. That is the date shown here, December 14, 1944, as being the date of the termination [92] of the bankruptcy proceedings.

I will offer as Plaintiff's Exhibit 15 the document we call the assumption agreement. That is an agreement signed by the Western Pacific Railroad Company, by Charles Elsey, President, and C. L. Droit, Secretary, dated December 14, 1944, which assumes certain obligations of the trustees in bankruptcy. I will read paragraph II of that agreement.

* * *

(The document referred to was received in evidence and marked Plaintiff's Exhibit 15.)

Mr. Phleger: I will now offer the following admission from the defendants' brief, the top of page 5:

"The holding corporation issued preferred and common stock which was listed and traded on the New York Stock Exchange and widely held by purchasers of railroad securities."

I will next offer as Plaintiff's Exhibit 16 the annual report of the parent corporation for the year 1941. This has been identified as Defendants' Exhibit 130; December 31, 1941. The testimony which will later be introduced will show that this was the last printed public report sent out by the corporation.

Mr. Adams: We intended to establish that fact ourselves.

Mr. Clark: I think that can be stipulated to, your Honor.

Mr. Phleger: I am chary of asking counsel for stipulations. I will direct the attention of the Court to the facing page of the report, which shows the officers as of December 31, 1941. They include H. Brua Campbell, Robert E. Coulson, Michael J. Curry, A. Perry Osborn, Thomas M. Schumacher, Willis D. Wood.

The executive committee consisted of the following: Robert E. Coulson, William M. Kingsley, Thomas M. Schumacher, Finley J. Shepard, Willis D. Wood, and the officers are shown to be Thomas M. Schumacher, President, and Michael J. Curry, Secretary and Treasurer, and Pierce & Greer, counsel.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 16.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 17 a sheet identified as Interveners' No. 50 headed "The Western [94] Pacific Railroad Corporation Schedule of Preferred and Common Stockholders of Record, September 11, 1935, to September 16, 1947. That would be Plaintiff's Exhibit 17.

I will direct the Court's attention to the fact that this exhibit shows holdings by the James interests in the parent corporation, proving the statements shown on the chart, that it held 8.8 per cent of the preferred stock as of November, 1943, and slightly less thereafter, and 61 per cent of the common stock at all times.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 17.)

Mr. Phleger: I will offer now the response to plaintiff's request 33:

"From 1925 until his death in 1941 Arthur Curtis James, individually and through certain wholly owned subsidiaries owned 8.8 per cent of the corporation's preferred stock and 61 per cent of its common stock together with substantial amounts of the corporation's secured bonds."

The railroad company's response admits, except they deny that the plaintiff ever had any secured bonds, and they deny that A. C. James individually or through any subsidiaries owned any

such bonds. The response of the Western Realty is the same. They did not own any bonds of the parent corporation.

Mr. Clark: There were no bonds outstanding, isn't that the [95] fact?

Mr. Phleger: Yes.

I will now offer as Plaintiff's Exhibit 18 a compilation identified as Interveners' Exhibit 342, headed "Securities of Western Pacific Railroad Company for the Period 1935 to 1947," which I ask be received and marked Plaintiff's Exhibit 18.

Mr. Adams: Mr. Phleger, this is limited to a statement of the securities owned by certain named persons.

Mr. Phleger: I will just point that out. I gave the heading on it. The heading I have read. The exhibit itself shows the holdings in the company of the so-called James interests. Not only its stock, but of bonds and collateral notes. They show as of 1945, or '46, whichever the date was, the conversion of 4½ per cent income mortgage bonds of the reorganized company, amounting to \$3,544,000, into common shares of the Western Pacific Company. That is, after reorganization, the James interests were the owners of 3½ million dollars' worth of bonds of the reorganized company, and at the time mentioned they converted those bonds into common stock. The exhibit I have just mentioned proves the basic facts which are shown on this chart. The bonds that I referred to are these bonds which, after the date of this chart, were converted into common stock.

The Court: That is Exhibit 1?

Mr. Phleger: This is Exhibit——

The Court: No, no, I mean the chart is Exhibit 1? [96]

Mr. Phleger: The chart is Exhibit 1, yes.

I now offer the admission from defendants' brief, page 6, reading as follows:

"Arthur Curtis James and his wife were the owners of all of the capital stock of the Curtis Southwestern Corporation, a New York corporation, and of Curtis Southwestern Company, a Delaware corporation, which in turn owned all of the capital stock of the A. C. James Company. Curtis Southwestern Company was the owner of 5 per cent collateral notes of the holding corporation."

I now offer as Plaintiff's Exhibit 19 a statement headed "The Western Pacific Railroad Corporation, Stockholders Meetings, 1935 to 1948," which is identified as Interveners' Exhibit 42, and shows the date of stockholders' meetings of the parent corporation during that period, and the dates on which there was a quorum present, the dates on which there was no quorum present, the number of shares represented at those meetings.

We will show later by the deposition of Mr. Coulson that there was never a quorum present during the period 1938 through 1944, unless the James stock was represented.

(The statement referred to was received in evidence and marked Plaintiff's Exhibit 19.)

Mr. Phleger: I will now offer as a group, as Plaintiff's Exhibit 20, the published annual reports of the Western Pacific [97] Railroad Company, a subsidiary company, as follows: 1942, 20A; 1943, 20B; 1944, 20C; 1945, 20D; 1946, 20E; and 1947, 20F.

(Annual reports, Western Pacific Railroad Company, referred to above, dated 1942, 1943, 1944, 1945, 1946 and 1947 were marked, respectively, Plaintiff's Exhibits 20A through 20F, in evidence.)

* * *

Mr. Phleger: Now I would like to call the Court's attention to certain statements and recitations in these annual reports. First is the report for 1942, No. 20A. The cover shows, "The Western Pacific Railroad Company, T. M. Schumacher and [98] Sidney M. Ehrman, Trustees in Reorganization." It is for the year 1942, and shows as officers as of the date December 31, 1942, among others, H. Brua Campbell, New York; Michael J. Curry, New York; A. Perry Osborn, New York; Thomas M. Schumacher, New York. It gives the executive committee as follows:

Thomas M. Schumacher, Michael J. Curry, H. Brua Campbell, Charles Elsey, and A. Perry Osborn. This is the railroad company.

Mr. Adams: Your Honor, at this point, if I may take a moment to state an objection to the score of materiality, so that I shall not have to repeat, once stated? Counsel has just read from the annual

statement the names of certain gentlemen designated upon the annual statement as directors and officers of the Western Pacific Railroad Company in the year 1942. Now, if your Honor please, from the year 1935, late in that year, to the end of the year 1944, those properties were in the possession of the trustees of the reorganization court, Mr. Schumacher and Mr. Ehrman. They had the title to the properties, they owned the properties, they operated the properties, and under the orders of Judge St. Sure the entire railroad organization was acting as employee and agent of those trustees. Mr. Elsey, by direction of Judge St. Sure at the beginning of the reorganization, was the agent for the trustees in the operation of those properties. But, your Honor, in 1935, Judge St. Sure issued his order enjoining this debtor railroad company, its officers and [99] directors, from having anything further to do with the operation of that property. That was in the hands of the trustees from then on, and these gentlemen whose names are called off as officers and directors,—as if that were significant in 1942—had in truth no functions, of any significance. They had no discretion, no power. They were nothing more or less than persons whom the court might direct in the pursuance of the court's operation and management of this railroad.

Nor was there, nor can there be, any duality shown by pointing to the names of these gentlemen at that time, as if this were a case in which these gentlemen had policies or powers or discretion of any sort, because they had not.

Mr. Phleger: I will be very glad to stipulate that during this period no meetings of either the executive committee or the directors were held. But I do think the fact that they held these positions, while it might not have given them any power, might have imposed upon them some duties.

The Court: Well, this is a published statement of the company?

Mr. Phleger: Yes, correct.

Mr. Clark: Well, just a moment; so the record may be clear, the intervener is not willing to concede that there were no meetings of the directors of the railroad company during this period of time, because I think charts which will come in evidence later will show that various people took office as directors [100] for the railroad company during the period of the railroad trusteeship that we are talking about in 1942.

Mr. Phleger: Yes, they took office in the fall, one, in 1944.

Mr. Clark: Well, some in 1940, too. Mr. Curry became a director of the railroad company in 1940, which is during the reorganization. So there must have been meetings during that time. And I think Mr. Adams will concede——

Mr. Adams: I think Mr. Clark's recollection is correct; as to this being a report of the company, your Honor, this is one of the reports that is put out during the period of trustee operation and management. It carries the names of the trustees and was a part of their function, the making of the report.

The Court: These directors were all holding office with the consent of the trustees?

Mr. Phleger: Obviously.

Mr. Clark: Apparently.

Mr. Adams: Yes, your Honor.

Mr. Clark: And they were holding meetings, your Honor, and the only purpose of my statement is—I don't want the intervenor in the case bound by the concession which Mr. Phleger was apparently willing to make.

Mr. Phleger: I probably am in error in that, but during certain periods they did not hold meetings.

I will call the Court's attention to the fact that this is, [101] of course, a report of the trustees in reorganization also, and as a published report, also is binding on the trustees. So the trustees, by the publication of this report, must have approved the statement that I have just read as to who held the offices.

Mr. Adams: Nor can there be any doubt that the corporate function, the function of the Board of Directors of the company during the period of reorganization, was enjoined and frozen and suspended by order of the reorganization court, and that the entire function of management, controlling the operation of the proceeding during that period, was the court's function and the trustee's function and not the function of the directors, who had no power.

The Court: Well, I suppose that as long as the

directors didn't do anything but that which had to do with the actual operation,—

Mr. Adams: The only function they had was to do what the trustees desired them to do and that the bankruptcy law required of them.

Mr. Phleger: Of course, during all of this period, as the reports and evidence will show, all of the transactions, with minor exceptions, were conducted in the name of the corporation by its corporate officers. Mr. Elsey always acted as president of the corporation. The consolidated tax returns were filed by Mr. Elsey as president of the corporation.

Mr. Clark: That is the railroad company? [102]

Mr. Phleger: That is right.

Mr. Clark: Not the Corporation.

Mr. Adams: Yes, and that was done pursuant to the explicit direction of Judge St. Sure, by his order of November 9, 1935.

The Court: Well, that all indicates that the corporate directors, or the officers, were delegated by the bankruptcy court. They were just prohibited from performing any functions having to do with the property and assets and the business of the company. But apparently the reorganization court wanted to make use of them as a part of the corporate entity in order to carry out some functions.

Mr. Adams: Your Honor, the reorganization court's orders would be the best evidence, of course, of the court's purposes; and they were cited, and the trustees are directed to engage Mr. Elsey, who

was the president of the railroad company, to act as their agent, the trustees' agent in the operation and management of the property. And they direct the trustees to take into their organization the going railroad organization. So that all the acts, all the records, all the reports, were carried on in the form as theretofore.

The Court: Well, that must have been with the approval of the trustees.

Mr. Adams: It was, with the explicit approval of the court itself, by direction of the court, your Honor. The trustees, of course, went to the court asking for such order. [103]

The Court: Well, I guess we are getting pretty far afield now. You say that is not material?

Mr. Adams: My point is that these gentlemen are spoken of here as directors as if they had some position adversary to the other corporation, the plaintiff; because Mr. Phleger was mentioning certain gentlemen who held relationships to the plaintiff. [103A]

The Court: Well, of course, it seems to me that whatever objection there might be there is all with reference to the weight that might be given to that, rather than to its admissibility at this moment.

Mr. Adams: I spoke of materiality, and I don't want to repeat myself frequently on this; but it is a very significant and important thing in our judgment that the duality which we have here spoken of so constantly is not a duality between two different companies, it is a duality between the plain-

tiff's corporation, which brought about this reorganization proceeding initially, and the court's trustees. That was the object, the main object, of my remark at this moment.

The Court: Well, this is just one isolated bit of testimony, which I can't evaluate separately until I have it all. Then maybe it won't have any weight and maybe it will have some weight. But I don't think that I should rule on it now—then I don't know whether at a later time, if it were entitled to have any weight, how I could reinstate it.

Mr. Adams: Well, I would assume, since the objection stated was as to materiality, I take it that objections on that score are not waived in any court.

The Court: Well, they might be, but there are some things that we could rule out as being immaterial if the immateriality is just obvious, right on the face of the document, or other evidence that is sought to be introduced. But it is not so [104] clear that I could make that kind of a ruling now. I think that what we have said in the record now is such that any rights that you may have are reserved. I will overrule the objection.

Mr. Adams: Very well, your Honor.

Mr. Phleger: I think I was reading the list of the executive committee. It consists, according to this report, of Thomas M. Schumacher, Michael J. Curry, H. Brua Campbell, Charles Elsey, and A. Perry Osborn.

I will recall to your Honor's attention that Schu-

macher, Curry, Campbell and Osborn were directors of the parent company.

Now, here is a list of the officers as of December 31, 1942: T. M. Schumacher, Chairman of the Executive Committee, New York; Charles Elsey, President, San Francisco; and M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, New York. As the evidence will show a little bit later, Mr. Curry, during this entire period, was conducting affairs and handling matters in his name as holder of the office of Vice President, Assistant Secretary and Assistant Treasurer.

Mr. Clark: Of the railroad company.

Mr. Phleger: Of the railroad company. [105]

* * *

I will now refer to Plaintiff's Exhibit 20-B, which is the report for 1943:

* * *

Mr. Phleger: The facing sheet on that report also contains a list of the corporate officers as of the end of 1943. It shows as directors: Michael J. Curry, A. Perry Osborn, Thomas M. Schumacher, and as executive committee Thomas M. Schumacher, Michael J. Curry, Charles Elsey and A. Perry Osborn. It shows as officers T. M. Schumacher, Chairman of the Executive Committee; Charles Elsey, President; M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer; and Pierce & Greer, counsel, 40 Wall Street, New York. The preceding annual report also contained the name

“Pierce & Greer, counsel, 40 Wall Street, New York.” I think I overlooked reading it. [106]

Now, I would like to read and call your Honor’s attention to a statement appearing on page 6 of that report with respect to taxes:

“Owing to an unusual situation resulting from the recent final confirmation of the Plan of Reorganization, no accrual was set up in respect of Federal income and excess profits taxes for 1943.

“Since 1916, Federal tax returns of this company have been made through a consolidated return filed by its parent holding company, The Western Pacific Railroad Corporation, which parent owned all of the capital stock of its subsidiary, The Western Pacific Railroad Company. The confirmed Plan of Reorganization for the railroad company characterizes the capital stock owned by the holding company as being ‘without equity or value.’

“A consolidated tax return for 1943 can and will be filed by the holding company. Tax counsel has advised that the holding company’s loss on its stock of the railroad company will result in elimination of any liability of the holding company for Federal income taxes for the year 1943 and therefore indirectly eliminate such taxes for the subsidiaries of the holding company. However, pending a final settlement with the Treasury Department, the Reorganization Trustees, [107] by authority of the court, have set aside a contingency reserve tax fund of \$7,100,000 invested in United States Government Treasury savings notes—Series

C. The credit tax accrual of \$9,886.13 results from an over-accrual in 1942.”

Mr. Adams: And may the record show that this again is a report published by Schumacher and Ehrman as trustees?

Mr. Phleger: That is correct.

The Court: That was in the end of 1943?

Mr. Phleger: December 31, 1943.

The Court: After the plan had been confirmed?

Mr. Clark: The evidence will show, your Honor, that that report came out in about May of 1944, about the year 1943.

Mr. Phleger: Yes. I think it was May of '44.

Mr. Clark: It was just about a month before the consolidated return for 1943 was signed by Mr. Curry as president of the holding company.

Mr. Phleger: Now I will refer to Plaintiff's Exhibit 20-C, which is a similar report for the year ended December 31, 1944. I direct the Court's attention to the fact that the directors, as of December 31, 1944, do not include any of the gentlemen residing in New York, whose names I have read. They are local people, for the most part. Well, they are local and Eastern people. But they do not include Schumacher, Osborn, Wood or Curry. Under the list of officers, however, are the following: [108] Charles Elsey, President; M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer.

I direct your Honor's attention to a note appearing on page 6, under the heading "Taxes":

"Prior to the period of reorganization, which be-

gan August 2, 1935, and through 1943, the company's tax returns had been made by the then parent, The Western Pacific Railroad Corporation, a holding corporation which owned all of the company's preferred and common stock, except directors' qualifying shares. The holding corporation filed a consolidated return for itself and its various subsidiaries, of which The Western Pacific Railroad Company was one.

"The plan of reorganization for The Western Pacific Railroad Company was confirmed on October 11, 1943, and found the preferred and common stock (owned by the holding corporation) to be 'without equity or value.' As a result of this loss, the consolidated return indicated no liability for 1943 Federal income or excess profits taxes. To provide against the contingency that liability of the railroad company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, the Reorganization Trustees obtained authority of the Court to set [109] aside a reserve fund of \$7,100,000 invested in Government securities."

". . . This entire reserve will be held intact to protect the cash position of the company in the event it should be later necessary to make any payment of taxes or interest resulting from an administrative or judicial ruling adverse to the company's contention that it was not liable for any Federal income or excess profits taxes for the calendar year 1943 and the first four months of 1944."

I call your Honor's attention to the fact that the return for '44 was not filed until June 15, 1945, which was six months after the company came out of bankruptcy; and that the reserve fund for \$3,000,000 was not set up until March 26, 1945, which was approximately four months after the property came out of bankruptcy.

Mr. Clark: Three months.

Mr. Phleger: You are right. [110]

* * *

Intervenors' Exhibit 410(d).

Mr. Phleger: I will now direct the Court's attention to Plaintiff's Exhibit 20-D, which is the annual report for the year 1945.

By the way, I might mention that the preceding exhibit, for the year 1944—never mind.

The report for 1945, 20-D, contains no reference to the trustees in bankruptcy. The facing sheet does not list as officers any of the persons whose names I have previously read. It does not include Mr. Curry or the other gentlemen. [110A]

Mr. Phleger: On page 6 there is the following statement with respect to taxes:

“Detailed information was given in last year's report of the reorganization trustees relating to the situation of the company with respect to Federal taxes for 1943 and the first four months of 1944. To provide against the contingency that liability of the company for some taxes in respect of 1943 might be subsequently asserted by the Commissioner of Internal Revenue, a reserve fund of \$7,100,000 was

established in 1944. On March 26, 1945, the board of directors authorized the increase of this fund to a total of \$10,100,000 to cover such a contingency for 1943 and the first four months of 1944. The entire fund is invested in Government securities and will be held intact to protect the cash position of the company should it be necessary to make payment of taxes or interest as a result of an administrative or judicial ruling adverse to the company's contentions."

I now call your attention to the report for the calendar year 1946, Exhibit 20-E. That contains the statement on page 11 with respect to taxes:

"As previously stated, the company's income for 1946 was in no degree attributable to the carry-back [111] provisions of the excess profits tax law. Information has heretofore been given in the reports for 1944 and 1945 as to the situation existing in connection with Federal income taxes for 1943 and the first four months of 1944 and the \$10,100,000 reserve fund which has been set aside to cover the contingency that liability of the company for some taxes during those periods might subsequently be asserted by the Commissioner of Internal Revenue. The question has not yet been settled and until the discussions with the Income Tax Bureau have been definitely concluded, the reserve will be maintained. The subject of payroll taxes has been heretofore discussed in connection with wage costs."

And on page 12 the following statement under the

heading of "Litigation." This is the report for the year 1946. I will call your attention to the fact that this suit was filed on October 10, 1946.

"In October, 1946, another action was brought by the former parent company in the United States District Court for the Northern District of California, Southern Division, against the Western Pacific Railroad Company and its subsidiaries. The complaint asserts a claim by the parent company based on savings in Federal taxes which may be realized by the defendant companies under consolidated tax returns for the years 1942 and 1943 and for the first four months of 1944, and a refund claim for the year 1942. The defendant companies have filed an answer denying liability, as well as a counterclaim seeking determination that the plaintiff corporation has no interest in any such prospective tax savings. The case has not been set for trial. In March, 1947, certain stockholders of the plaintiff corporation applied to the court for leave to intervene in this action. At the date of this report the application had not been heard by the court."

I now refer to the report for the last year, 1947, Plaintiff's Exhibit 20-F, page 12:

"Information has been given in previous reports as to the situation existing in connection with Federal income taxes for 1943 and the first four months of 1944 and the \$10,100,000 reserve fund which had been set aside to cover the contingency that liability of the company for some taxes during those periods

might subsequently be asserted by the Commissioner of Internal Revenue. The Treasury Department has notified the company that the tax returns for the periods prior to May 1, 1944, have been accepted as filed. The \$10,100,000 fund, [113] previously reserved against contingent tax liabilities and invested in U. S. Government bonds, has since been retained as a reserve fund for contingent liabilities in litigation, awaiting the outcome of law suits now pending. Tax returns filed for the periods subsequent to May 1, 1944, have not as yet been audited by the Treasury Department."

Under the heading of "Litigation."

"Reference was also made in the report for last year to another action brought in October, 1946, by the former parent company in the United States District Court for the Northern District of California, Southern Division, against the Western Pacific Railroad Company and its subsidiaries, asserting a claim by the former parent company arising out of savings in Federal taxes which may be realized by the defendant companies under consolidated tax returns for the years 1942 and 1943 and for the first four months of 1944, including therein a claim for refund of taxes paid for the year 1942. The stockholders of the former parent company who had petitioned for leave to intervene at the time of the last report were subsequently allowed to intervene and they are actively supporting the plaintiff's claim. The taking of certain [114] depositions in this action commenced in New York City

on February 9, 1948, and will probably continue throughout a period of several weeks."

I will now offer as Plaintiff's Exhibit 21 a sheet headed "The Western Pacific Railroad Company, Schedule of Officers, August 1, 1935, to February 9, 1948." That sheet is also identified as Interveners' Exhibit 26.

Mr. Clark: That is of the corporation, the holding corporation, isn't it?

Mr. Phleger: Western Pacific Railroad Corporation.

Mr. Clark: I thought I heard you say "Company." I am sorry.

Mr. Phleger: No, it is the corporation. I will not stop to read the list of officers, but the list of officers shown supports this chart as to the period covered by the chart; Schumacher, President; Curry, Secretary; Curry, Treasurer; Curry, President; Wienken, Secretary; Valouch, Vice President and Secretary. [115]

* * *

Wednesday, February 2, 1949—10:00 A.M.

* * *

Mr. Phleger: The last exhibit admitted in evidence yesterday was Plaintiff's Exhibit 21. I will now offer as Plaintiff's Exhibit 22 a sheet headed "The Western Pacific Railroad Corporation, Schedule of Directors, August 1, 1935, to February 9, 1948." That is also identified as Interveners' Exhibit 27. The schedule shows that these directors shown on Plaintiff's Exhibit 2, Schumacher, Curry,

Valouch, Sheehan, Wienken, Osborne, Wood and Hatton, served during the periods shown upon this chart, this chart covering the period June 1, 1943, to October 10, 1946.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 22.)

Mr. Phleger: I will next offer as Plaintiff's Exhibit 23, also identified as Interveners' 44, schedule headed "The Western Pacific Railroad Corporation, Schedule of Payments Made to Officers, Counsel and Employees during the Period August 1, 1935, to December 31, 1946." May it please the Court, this exhibit supports the facts shown on Plaintiff's Exhibit 2 with respect to the fact that the officers and directors shown on it under the heading of "Officers and Directors of the Plaintiff Corporation" received no compensation for services during the [116] period shown by this chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 23.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 24, also identified as Interveners' Exhibit 5, a sheet headed "The Western Pacific Railroad Corporation, Schedule of Payments made to Pierce & Greer or H. Brua Campbell January 1, 1942, to December 31, 1945." The firm of Pierce & Greer are shown on the chart, Plaintiff's Exhibit 2. The members of that firm, as will appear from the evidence, consist of Mr. Nicodemus and Mr. Camp-

bell. The evidence already introduced shows that during this period they were general counsel for the plaintiff corporation, and as shown by the reports of the defendant company in evidence, they were shown as counsel for the company through 1943. We will show by subsequent evidence that they were counsel for the company and received compensation for a later date. I direct attention also to the fact that this exhibit shows that there was no compensation received by Pierce & Greer from the plaintiff corporation for services rendered after May, 1943, through December 31, 1945. That is, while counsel for the plaintiff corporation they received no compensation during the period shown on that chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 24.)

Mr. Phleger: I will now offer in evidence as Plaintiff's [117] Exhibit 25 a sheet identified also as Interveners' Exhibit 45 headed "The Western Pacific Railroad Company, List of Corporate Officers and Terms Thereof, January 1, 1935, to February 12, 1948." I direct the attention of the Court to the fact that this exhibit supports certain of the statements contained on Plaintiff's Exhibit 2. It shows that M. J. Curry, the president of the plaintiff corporation, was the vice president, assistant secretary and assistant treasurer of the defendant railroad company during the period January 1, 1935, through to April 30, 1945, during the entire period covered by the chart up to the date just

mentioned. It also shows that T. M. Schumacher, who was a director of the plaintiff corporation and holding various positions with the defendant corporation, was chairman of the executive committee of the defendant railroad company during this period starting in 1935 up to December 28, 1944.

(The document referred to was marked Plaintiff's Exhibit 25.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 26 four sheets identified as Interveners' 96, 97, 98 and 99, consisting of copies of the ballots of the James interests used in elections of the Western Pacific Railroad Company, the defendant company, at special meetings of the stockholders held on March 26, 1945; June 27, 1945; June 26, 1946, and June 25, 1947. The exhibits show that at the meeting of March 26, 1945, the [118] James Foundation of New York and the A. C. James Company, by Robert E. Coulson, cast a ballot of 134,738 shares of stock for the directors listed, which included Robert E. Coulson; that at the annual meeting of June 27, 1945, the James Foundation of New York and the A. C. James Company, acting by Robert E. Coulson, proxy, cast a vote for 134,738 shares of stock for the directors listed, including Robert E. Coulson; that at the meeting of June 26, 1946, the James Foundation of New York, by Robert E. Coulson, proxy, cast a vote of 208,892 shares of stock. That shows the additional shares which resulted from the conversion of the debt into common stock mentioned the other day

for the list of directors, including Robert E. Coulson; and, finally, at the meeting of June 25, 1947, the James Foundation of New York, by Robert E. Coulson, proxy, cast——

Mr. Adams: Mr. Phleger, will you read the names of the proxies, please?

Mr. Phleger: Excuse me. Robert E. Coulson and Stuart Jenkins, proxies for the James Foundation of New York, voted 208,892 shares of stock for the list of directors, including Robert E. Coulson and Stuart Jenkins.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 26.)

Mr. Phleger: I will next offer in evidence as Plaintiff's Exhibit 27 a document consisting of four sheets, otherwise identified as Interveners' 222-A, headed "The Western Pacific [119] Railroad Company, Statement Showing Funds Supplied by the Western Pacific Railroad Company to Mr. M. J. Curry, Assistant Treasurer, for Use in Meeting the Expenses of its New York Office," and a detail of expenditures made from such funds by Mr. Curry for the period March 15, 1943, to May 1, 1945. I call the Court's attention to the fact that our chronology shows that on June 1, 1943, all of the employees in the New York office were taken over as full-time employees of the trustees. This exhibit shows that there was paid during the period stated by the defendant railroad to Mr. Curry for the maintenance of that office and the payment of salaries the total sum of \$107,183.62. It also

contains the information which supports the showing of Plaintiff's Exhibit 2 of the receipt of compensation by those who occupied positions both with the corporation and with the company which are indicated by the red lines running to the company and the trustee. For example, Mr. Greer's salary which was paid by the company during this period to May 1, 1945, is shown as \$11,700 a year. Miss Valouch ranged from \$2,640 a year to \$2,860 a year; and Sheehan between \$1,980 to \$2,344 a year. All are shown by this exhibit to have been paid out of funds supplied by the defendant corporation to Mr. Curry as an officer——

Mr. Adams: I object to that statement, your Honor. The showing is that these funds came out of moneys in the hands of the court and were provided for the court's trustees. [120].

Mr. Phleger: I think the statement that I read——

The Court: I think I understand it. I do not need discussion.

Mr. Phleger: The title of the document is "Supplied by the Western Pacific Railroad Company." That supports the showing of the receipt of compensation shown on Plaintiff's Exhibit 2.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 27.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 28 a sheet also identified as Defendants' Exhibit 889, which is a one-sheet memorandum dated "San Francisco, June 2, 1943," with the initials

E. W. E., which I take it stand for Mr. Englebright, who is assistant to the president for the defendant company——

Mr. Adams: That is correct, and it is Mr. Engelbright's initial that appears below those typewritten initials.

Mr. Phleger: The document is headed "Memorandum for File Supplementing Information on the Memorandum of Conference Dated June 2, 1943, Relating to the Assumption of Certain Salaries and Expenses of the New York Office by the Trustees, the following details are of record:" and then in columns it shows the amount previously paid by the trustees, the amount previously paid by the W. P. Corporation, the total now to be paid by the trustees, that is, on a monthly [121] basis, and the annual total.

As the evidence will show, previous to this date of June 1 the employees shown on Plaintiff's Exhibit 2 were paid jointly by the corporation and by the company or trustees. After that date the entire compensation was taken over by the company or trustees and this exhibit shows the amounts paid previously by the two parties and the amounts thereafter paid by the defendant company or trustees, showing that that amount was the aggregate of the amounts previously paid by both parties. The employees listed are M. J. Curry, who was the president of the corporation; H. Brua Campbell, who was a member of the firm of Pierce & Greer, and Campbell was a director of the plaintiff corpora-

tion; Mary C. Valouch, who was a vice president, secretary and director of the corporation from May 1, 1945, and was secretary to Mr. Schumacher and assistant secretary of the company; John F. Wienken, who was the stenographer but who was a director and secretary of the plaintiff corporation; Lillian O'Neill, who was not a director or officer of the corporation but a telephone operator, and Catherine C. Sheehan.

Mr. Adams: Your Honor, I object to plaintiff's characterization of Mr. Wienken as a stenographer. There is nothing in the record to indicate that.

Mr. Phleger: We will show his functions and duties.

Mr. Clark: There very definitely is, your Honor; there [122] is direct testimony to the effect that Mr. Wienken is Mr. Curry's stenographer.

Mr. Phleger: We will later prove that, and it is shown in the depositions.

This exhibit further substantiates the statements contained on Plaintiff's Exhibit 2 as to the sources, amounts and duration of the compensation of the officers whose names are shown upon that chart.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 28.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 29 a sheet also identified as Interveners' Exhibit 373. It is one sheet of paper dated New York, January 27, 1943, signed by T. M. Schumacher, addressed to Mr. Curry. It reads: [123]

(The document referred to was received in evidence and marked Plaintiff's Exhibit 29.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 30 a memorandum consisting of two pages and a letter, which I will now describe, which are also identified as Interveners' 292 and Interveners' 4-A. The two-sheet memorandum is headed as [124] follows: "Memorandum of Conference June 2, 1943." It is signed by Charles Elsey, who is the president of the defendant railroad company. It reads as follows: [125]

* * *

I will next offer as Plaintiff's Exhibit 31 a document also identified as interveners' document 106, which consists of a letter dated November 9, 1943, addressed to Colonel Robert E. Coulson, 40 Wall Street, New York 5, New York, by Mr. F. C. Nicodemus, Jr., with a copy to Mr. T. M. Schumacher (reading):

"Dear Colonel Coulson:

"This will acknowledge receipt of your firm's letter of November 8, 1943, enclosing the report of the Reorganization Committee of the collection of officers and counsel and the designation of mailing address and adoption of by-laws.

"This also seems very formal and excessively regular but nevertheless I wish to write informally to congratulate the Reorganization Committee on the selection of your firm as its counsel. As counsel for the debtor as well as for the Western Pacific Railroad Corporation I stand ready to cooperate

to the fullest extent in expediting the reorganization.”

* * *

Mr. Adams: Would you read the last paragraph so that the [130] whole text may be there?

Mr. Phleger: (Reading.)

“At the risk of possible repetition of what I have said to you personally I think your firm will render a distinct service if it insists on the preparation of trust indentures of a somewhat different character than those that have been used in recent reorganization.”

* * *

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 31.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 32 a document also identified as interveners' document 316. It consists of a letter and also a telegram identified as interveners' 317. The first is a letter dated April 21, 1945, on the letterhead of the firm of Whitman, Ransom, Coulson and Goetz, signed by Robert Coulson and addressed to Mr. Charles Elsey, President of the Western Pacific Railroad Company: [131]

* * *

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 32A, and the telegram marked 32B.)

Mr. Phleger: I will next offer as Plaintiff's Exhibit 33 a letter also identified as interven-

ers' exhibit 38. It is a letter dated June 6, 1945, on the letterhead of Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, signed by Robert E. Coulson and addressed to Mr. M. J. Curry, 10 Perth Ave., New Rochelle, New York (reading):

"Enclosed is the check of this firm for \$750 which represents a quarterly payment on your retainer by this firm for services in connection with the pending tax matters with which we are dealing in behalf of The Western Pacific Railroad Company. As agreed, this retainer is to be on an annual basis of \$3000 and this quarterly installment covers the period from May 1 to July 31, 1945.

"You will note that there are no deductions from this check on account of taxes or social security premiums since you are in no sense an employee of this office or The Western Pacific Railroad Company but are merely [137] retained as an independent contractor to make studies and reports and perhaps subsequently act as a witness in connection with the pending tax problem.

"Sincerely yours,

"ROBERT E. COULSON."

(The letter referred to above was received in evidence and marked Plaintiff's Exhibit 33.)

Mr. Phleger: I will now offer defendant's response to plaintiff's request No. 23. The request reads:

“For many years and till May 1, 1945, Miss Valouch was a clerk in the employ of the company. She received from the company compensation in 1943 of \$2500, in 1944 of \$2960, and in 1945 of \$953. On and after May 1, 1945, she became an employee of Coulson’s firm to assist them in their tax matters.”

The railroad defendant’s response is:

“Admit that Miss Valouch received compensation from the defendant, the Western Pacific Railroad Company, in the amount of \$953 in 1945, and on and after May 1, 1945, became an employee of the firm of Whitman, Ransom, Coulson and Goetz.”

The response of Western Realty is in substance the same. I will now offer as Plaintiff’s Exhibit 34A, B, and C, three documents which are respectively identified as interveners’ exhibits 404, 405, and 406. [138]

34A consists of a letter signed by Mr. M. J. Curry dated January 24, 1945, on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York, New York, M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, to the Western Pacific Railroad Company and to its Board of Directors (reading):

“Dear Sirs:

“I have been an officer of the Western Pacific Railroad Company (Vice-President, Assistant Secretary and Assistant Treasurer) as well as an officer of the Western Pacific Railroad Corporation, in New York, continuously since April 1, 1927.

“Having reached the age of 65 on September 30, 1944, I am desirous of retiring from the service upon the discontinuance and closing of this office and therefore submit this as my application for the granting to me of a pension.

“Yours very truly,

“M. J. CURRY.”

The next sheet, 34B, consists of a similar letter signed by T. M. Schumacher, similarly citing his retirement (reading):

“Dear Sirs:

“I have been chairman of the Executive Committee of the Western Pacific Railroad Company since July 1, 1926, as well as an officer of the Western Pacific [139] Railroad Corporation. From November, 1935, to January 1, 1945, I was one of the two reorganization trustees of your company. The reorganization of the Western Pacific Railroad Company was consummated on January 1, 1945, and my status as reorganization trustee was continued (by order of the United States District Court which appointed me) until May, 1945, for the purpose of preparing and filing a closing report of said trusteeship.

“Inasmuch as I have, as of February 1, 1943, resigned as an officer of the Western Pacific Railroad Corporation and it appears that my duties as trustee of the Western Pacific Railroad Company will be completed on May 1, 1945, it is my desire that I retire, as of that day, or as soon thereafter as

I am discharged as trustee by the court, and that this letter serve as my application for a pension, account chairman of the executive committee, retired.

“Yours very truly,

“T. M. SCHUMACHER.”

The third sheet, 34C, I do not need to read in full. It is a certified copy of a resolution of the Board of Directors of the Western Pacific Railroad Company held on January 26, 1945, granting the pensions as requested.

(Letters referred to above and resolution of Board of Directors were received in evidence and marked Plaintiff's [140] Exhibits 34A, 34B and 34C, respectively.)

Mr. Phleger: I will now offer in evidence defendant's response to plaintiff's request No. 28, which reads (reading):

“H. Brua Campbell——”

whom you will note on Plaintiff's Exhibit 2 is shown as a director of the corporation to for plant 1, plant 45, and also one of the attorneys for the company or trustees——

“——was and is an attorney and associate of Mr. F. C. Nicodemus of the law firm of Pierce & Greer.”

The response of the defendant railroad company (reading):

“Admit that H. Brua Campbell was an attorney, but upon the basis of the testimony of Mr. Frank C. Nicodemus, Jr., allege that he was a partner of

Mr. Frank C. Nicodemus, Jr., in the law firm of Pierce & Greer."

The response of Western Realty was substantially the same.

I will now offer in evidence defendant's response to plaintiff's request No. 29 (reading):

"Mr. Nicodemus, Jr., and his firm, Pierce & Greer, were counsel for the company for many years until January 1, 1945, and were New York counsel for Mr. Schumacher in his capacity as one of the reorganization trustees of the company. Pierce and Greer were also general counsel for the corporation."

The response of the defendant railroad company (reading):

"Deny request 29, except that admit that Pierce & Greer [141] were and are general counsel for the plaintiff."

The response of Western Realty is to the same effect.

I will now offer in evidence an admission on page 5 of the defendant's brief (reading):

"The holding corporation's Board of Directors met in New York and the holding corporation and the debtor had the same legal representation in New York."

I will now offer as plaintiff's exhibit 35, a document also identified as interveners' 286. It is a sheet dated May 28, 1945 (reading):

“Pierce & Greer and Frank C. Nicodemus, Jr.
40 Wall Street,
New York 5, New York.

“For allowance by order dated May 21, 1945, of the District Court of the United States, for the Northern District of California, Southern Division, in the matter of the Western Pacific Railroad Company, Debtor, No. 26591-S, as compensation for services rendered and for expenses incurred (including attorneys' fees) in connection with this proceeding, and the plan of reorganization confirmed therein, from November 1, 1939, to date of termination of these proceedings.

“Services, \$5,250.00.

“General, \$5,250.00.

“Pierce & Greer and Frank C. Nicodemus, Jr., \$5,250.00. Five thousand two hundred fifty 00/100.”

(Paper referred to above was received in evidence and marked Plaintiff's Exhibit 35.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 36 sheets identified as interveners' exhibits 281, 282, 283, 284, all as one exhibit.

The first sheet consists of a letter signed by Charles Elsey, dated “San Francisco, December 19, 1945.” It is addressed to Mr. C. W. Dooling and reads as follows (reading):

“Enclosed is a copy of a letter to me, dated New York, December 17, from Mr. F. C. Nicodemus, Jr., concerning fees to Pierce & Greer for services for our account during the year 1945.

“If this bill is satisfactory, will you please ap-

prove it and pass it to the auditor so that it may be included in December accounts?"

The amount of the last two bills is shown on Plaintiff's Exhibit 2, and included in the red lines running to "trustees" or "company."

The second sheet of the exhibit is a letter on the letterhead of Pierce & Greer, 40 Wall Street, New York 5, signed by F. C. Nicodemus, Jr., and dated December 17, 1945. It is addressed to Mr. Charles Elsey, President, the Western Pacific Railroad Company, 526 Mission Street, San Francisco 5, California (reading):

"Dear Mr. Elsey: [143]

"At the time of the consummation of the reorganization proceedings you asked our firm to continue handling the minor law matters and negotiations growing out of the carrier operations.

"You stated that the compensation would be on a mutually satisfactory, individual fee basis. We have allowed this to run along for approximately a year and I thought it opportune to send in a bill for the current calendar year. We do not think that there will be any further matters of substance to be handled during the remaining two weeks of the year, and I am sending the bill now for attention this year, which may be desirable from both of our standpoints.

"While it is difficult to appraise services of this nature, we are sending a bill in the amount of \$2,500 which seems to us reasonable for the services shown in the schedule thereto attached.

You will see from this schedule that Mr. Campbell devoted much time to these various matters.

“With kind personal regards,

“Yours very truly,

“F. C. NICODEMUS, JR.”

The third sheet is a bill or invoice dated December 17, 1945, for legal services from 1 January, 1945, to 31 December, 1945, in the amount of \$2,500. [144]

Mr. Phleger: The next sheet shows the receipt of payment of that bill.

Mr. Adams: The third sheet, Mr. Phleger, is neither a bill nor invoice but is a voucher for payment.

Mr. Phleger: A voucher for payment?

Mr. Adams: Yes.

Mr. Phleger: Thank you. The next sheet is the actual receipted bill with the O.K. of Mr. Dooling.

I will next offer in evidence the defendants' response to plaintiff's requests 35 and 36.

Request 35:

“Mr. Coulson and his firm were attorneys for James and his holding companies and are attorneys for the James Foundation and Coulson has always been one of its trustees.”

That is admitted by the defendants.

Request 36:

“During Mr. James' lifetime he and Coulson's firm on his behalf and after his death and until the decision of the United States Supreme Court on March 15, 1943, affirming the order of the Bankruptcy Court approving the plan, James Estate

and James Foundation and Mr. Coulson's firm on their behalf were active in opposing approval of the plan. The response of the [145] defendant Railroad Company admit Request No. 36 if that request refers to the modified plan of reorganization promulgated by the ICC."

The response of the Western Realty is to the same effect.

I will now offer in evidence as Plaintiff's Exhibit 37 a letter also identified as Defendants' Exhibit 864. This is a letter on the letterhead of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York. The date is February 24, 1943. That date, I will direct the Court's attention to, is a date shortly before the Supreme Court approved the plan. It is signed by Robert E. Coulson, I. C., addressed to Mr. Charles Elsey, President of the Western Pacific Railroad Company, Mills Building, San Francisco.

"Dear Mr. Elsey:

"I am extremely anxious to receive as early as possible a copy of the Federal income tax return for 1942 of the Western Pacific Railroad Company together with sufficient of the working sheets to see how the tax was computed. No doubt I might obtain this in New York as I assume the question of a consolidated return has been considered and adopted or rejected. However, I also want to obtain figures which I have no doubt you have had made up as to what the Federal tax would be if the Commission plan had been in effect in 1942.

These [146] figures I could probably only obtain through your office, and I am therefore writing you directly for them. While the Supreme Court has delayed a long time in considering the questions presented to it, I am inclined to believe that a decision will come down next Monday.

“Sincerely yours,

“ROBERT E. COULSON.”

I will direct your attention to the fact that as of the date of this letter there was no official connection between Robert E. Coulson and the Western Pacific Railroad Company.

Mr. Adams: If the Court please, I take exception to that remark. His official position, of course, was one of representation which he had had with the reorganization for many years. Mr. Coulson appeared throughout the proceedings as the attorney for the A. C. James Co. in the reorganization proceeding, and like every other party to the proceedings he was entitled to ask Mr. Elsey, the trustees' agent, for information. That statement is out of order.

Mr. Phleger: I am not questioning his right, perhaps to request the information. I am pointing out a fact, which you cannot deny, that at this date he had no official connection either with the trustees in reorganization or with the Western Pacific Railroad Company.

Mr. Adams: I have stated the fact of record that he had [147] an official representation for a

party to the reorganization, the A. C. James Co., and had such for years. [148]

* * *

Mr. Phleger: I will now offer as Plaintiff's Exhibit 38-A a memorandum identified as Interveners' 51-A. I will offer as Plaintiff's Exhibit 38-B a letter identified as Interveners' 51-B and 51-C.

(The documents referred to were received in evidence and marked respectively Plaintiff's Exhibits 38-A and 38-B.)

Mr. Phleger: 38-A is a memorandum dated March 15, 1943, signed "R. E. C.," meaning Mr. Coulson. It is addressed "Memorandum for Mr. Polk." Mr Polk is a partner in the Ransom firm and handled the tax matters, as will be more fully developed by the evidence. This is the memorandum:

"I wish you would read the attached letter from Charles Elsey. It makes me wonder whether I ought not to insist on reviewing the consolidated tax return. Actually I happen to know that the only person in the corporation office over here in New York who has any knowledge of taxes is a girl who is primarily Schumacher's secretary. They probably have certified public accountants auditing the corporation books who are of some use to her, but I would be a little surprised if the [149] report were intelligently prepared. Either Elsey's letter is evasive or his organization in California

has done very little on the tax returns. Also I find it quite impossible to spell out from his letter what they have really done on depreciation. I would be glad to have your reaction on all this."

It is endorsed at the bottom of the letter in handwriting——

Mr. Adams: Mr. Polk's handwriting?

Mr. Clark: Concededly.

Mr. Phleger: Mr. Polk's handwriting, addressed to Colonel Coulson, is this statement:

"As I understand the procedure in the New York office, only the lady referred to had any part in the preparation of the return. She now has separate company data and will require several weeks to prepare consolidated schedules. She 'confers' with an accounting firm, but Mr. Curry says they are too impoverished to hire accounting help. They paid on March 15 a quarterly payment of \$1,000,-000. No decision has been reached as to depreciation treatment. I will follow this up if you so direct in about four weeks.

"J. K. P."

Up at the top in pencil is this: "J. K. P.: Better follow up. R. E. C." [150]

Exhibit 38-B, attached to 38-A, is a letter signed by Charles Elsey dated March 9, 1943, on the letterhead of the Western Pacific Railroad Company, San Francisco, California, addressed to Mr. Robert E. Coulson, care of Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York:

“Dear Mr. Coulson:

“This refers to your letter of February 24 making inquiry with respect to certain income tax matters. Income tax for the Western Pacific and its subsidiary companies is computed on the basis of a consolidated return by the Western Pacific Railroad Corporation. We do not compute the income taxes of the various companies separately. Under date of March 5, 1943, Mr. D. C. DeGraff, our general auditor, furnished Mr. Curry with all the required income tax data for the following companies: Western Pacific Railroad Company, Sacramento Northern, Tidewater Southern, Deep Creek, the Western Realty Company, Standard Realty and Development Co., the Delta Finance Company, Ltd. Using this data Mr. Curry is in a position to proceed with preparation of the consolidated return and you can obtain full information from him. As to the question of the second paragraph of your letter, I fear it must go unanswered, because no one knows at this time how or on [151] what basis the income tax of the reorganized company will be computed for the years 1939 to date. So far as we are aware, no waiver has been included covering the taxes for the year 1939, in which case the return already made would stand. Certain phases of the tax for 1942 would be dependent upon results of 1940 and 1941, and the whole subject is so full of uncertainties that we have ceased to make any attempt to compute taxes on the reorganized company basis. The forthcoming

decision of the Supreme Court could also change the entire picture."

Mr. Clark: Your Honor, may I ask Mr. Adams if he will concede that the lady referred to in Interveners' 51-A, which is now Plaintiff's Exhibit 38-A, was Miss Valouch?

Mr. Adams: I will agree with that inference, and I take it all counsel are agreed on that.

Mr. Clark: Thank you.

Mr. Phleger: I think it is apparent from the face of the document, particularly as it is in quotes.

I will now offer as Plaintiff's Exhibit 39-A, 39-B, 39-C, 39-D, 39-E and 39-F letters identified respectively as Interveners' 6, Interveners' 7, Interveners' 8, Defendants' 20, Defendants' 21 and Defendants' 23 and consisting of the following: These have to do, if your Honor please, with the employment of Mr. Coulson to handle the tax matter.

* * *

Mr. Adams: May I inquire, your Honor, with reference to the remark last made by Mr. Phleger, in which he referred to the engagement of Mr. Coulson as tax counsel, whether he had any purpose in distinguishing Mr. Coulson and his firm?

Mr. Phleger: No, I did not. I simply wanted to direct the attention of the Court to the significance of this exhibit, which shows the employment of Mr. Coulson and his firm as tax counsel.

Mr. Adams: The record will show the employment of the firm. I take it you have nothing in mind by way of distinguishing between Mr. Coulson and his firm?

Mr. Phleger: No, I have not.

I will now direct the Court's attention to Exhibits 39-A to -F, inclusive.

(Letter dated March 23, 1943, signed by T. M. Schumacher; letter dated March 23, 1943, signed by F. C. Nicodemus, Jr.; letter dated March 23, 1943, signed by F. C. Nicodemus, Jr.; letter dated April 7, 1943, signed by T. M. Schumacher; letter dated April 8, 1943, signed by F. C. Nicodemus, Jr., and letter dated April 20, 1943, signed by Robert E. Coulson, were received in evidence and marked Plaintiff's Exhibits 39-A to -F, inclusive.)

Mr. Phleger: 39-A is a letter on the letterhead of the Western Pacific Railroad Company, T. M. Schumacher and Sidney Mr. Ehrman, Trustees, signed by T. M. Schumacher and dated [153] March 23, 1943. I direct the Court's attention to the fact that that was a few days after the decision of the United States Supreme Court. It is addressed to Mr. F. C. Nicodemus, Jr., Pierce & Greer, 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942.

"The return filed is a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the Trustees of the Western

Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the Trustees, in protecting the trust estate in the preparation of the final return."

39-B consists in Mr. Nicodemus' reply to that letter. It is dated March 23, 1943, the same date, addressed to Mr. T. M. Schumacher, Trustee, The Western Pacific Railroad Company, 37 Wall Street, New York, New York:

"Dear Mr. Schumacher:

"This will acknowledge your letter of today's date re income tax returns for 1942.

"The preparation of the final return involves many new and difficult questions arising under [154] the recent amendments to the Internal Revenue Code. These are essentially questions which I (and I am certain Mr. Matthew will feel the same way) would hesitate to determine without the advice of experienced tax experts who are in constant touch with the Treasury. I should assume that we would wish to have a number of conferences with the Bureau of Internal Revenue as to many phases of the new act before even reaching a decision upon the very critical question as to whether it should be a consolidated return or whether the trustees should make a separate return on behalf of the Railroad Company. This is but one of the many questions affecting very heavy present and potential tax liabilities to which we should give immediate attention.

"My suggestion is, therefore, that you authorize

me to arrange, if possible, for the services of Messrs. Whitman, Ransom, Coulson & Goetz, who are peculiarly well equipped to give the kind of expert advice that we will require and who are also very familiar with the problems of the Western Pacific Railroad Company. This employment is within the authority granted to the Trustees by the original orders made by Judge St. Sure.

“Very truly yours,

“F. C. NICODEMUS, JR.” [155]

Now, 39-C is a letter signed by Mr. Nicodemus on the letterhead of Pierce & Greer, dated March 23, 1943, addressed to Colonel Robert E. Coulson, Messrs. Whitman, Ransom, Coulson & Goetz, 40 Wall Street, New York City:

“Dear Colonel Coulson:

“Enclosed is a copy of a timely letter received this morning from Mr. Schumacher, together with my reply.”

This is obviously the two letters I have just read.

“If this arrangement is agreeable to you and your associates would you be willing to start right in without waiting for a confirmation from Mr. Ehrman. The time has been extended to May 15, 1943, but even this extended time is too short for adequate consideration of the questions which are certain to arise in this matter.

“My best regards to you.

“Very truly yours,

“F. C. NICODEMUS, JR.”

That is followed by 39-D, a letter from Mr. Schumacher, dated April 7, 1943, addressed to Messrs. Pierce & Greer, 40 Wall Street, New York, New York, attention Mr. F. C. Nicodemus, Jr. It is from T. M. Schumacher and Sidney M. Ehrman, Trustees, with copies to Mr. Sidney M. Ehrman, Mr. Charles Elsey and Mr. Allan P. Matthew:

“Dear Mr. Nicodemus: [156]

“Referring to your letter of March 23, 1943, in regard to our tax matters:

“Since receiving your letter, I talked the subject over on the telephone with Mr. Ehrman and wrote him on March 31 (copy to you) and, as you know, while Mr. Matthew was in New York recently I discussed it with him, at which time he stated he fully agreed with your recommendation to employ competent tax counsel for advisory services in connection with the preparation of final Federal tax returns for the calendar year 1942.

“Upon Mr. Matthew’s return to San Francisco, he conferred with Mr. Ehrman on the matter and, this morning, I am in receipt of a letter from him, dated April 5, 1943 (copy attached) in which he advises that the firm of Whitman, Ransom, Coulson & Goetz, which you recommended, is acceptable to Mr. Ehrman.

“As it is agreeable to me also, this will authorize you to arrange forthwith for the services of Whitman, Ransom, Coulson & Goetz, since the Federal returns must be filed on or before May 15, 1943.

“Yours very truly,

“T. M. SCHUMACHER.”

The next, 39-E, is a letter from Mr. Nicodemus to Colonel Robert E. Coulson dated April 8, 1943: "Dear Colonel Coulson:

"Referring to my recommendation to Messrs. Schumacher and Ehrman that your firm be engaged as advisory counsel to aid Mr. Matthew and me in the solution of the serious problems that will arise in connection with the preparation of final Federal tax returns for the calendar year 1942, I am just in receipt of advice from Mr. Schumacher that this recommendation in which Mr. Matthew has concurred is agreeable to the two Trustees and that they desire me to arrange forthwith for your firm's services.

"Since you already have advised me informally of your firm's willingness to undertake this work I write merely to confirm the arrangement and to say that I will hold myself in readiness to confer with your Mr. Polk and to make available to him such data as has been supplied to me and such further data as he may desire.

"The firm of Lybrand, Ross and Montgomery has been employed in connection with certain accounting problems and I understand their services will be available to us to the extent that we deem necessary."

The final letter of the series is 39-F, a letter on the letterhead of Whitman, Ransom, Coulson & Goetz, signed by Robert E. Coulson, dated April 20, 1943, and addressed to F. C. [158] Nicodemus, Jr., Esq., 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"This is a belated acknowledgment of your letter

of April 8, 1943. I had assumed from its text and from the fact that Mr. Polk and you were already at work when I received your letter that you needed no formal acknowledgment. However, it may be better, as a matter of record, that you should have a formal acknowledgment of the fact that we have undertaken the Federal tax work for the Trustees as advisory counsel in conjunction with yourself and Mr. Matthew.

“Sincerely yours,

“ROBERT E. COULSON.”

I will now offer in evidence the response of defendants to plaintiff's Request 38-A:

“Robert E. Coulson has been a director of the company ever since December 28, 1944.” That was admitted by the railroad company defendant and by the Western Realty.

Mr. Adams: Did that admission characterize the company as the reorganized company?

Mr. Phleger: No, it does not. The response reads——

Mr. Adams: The first one was the defendant, I take it?

Mr. Phleger: The first one reads: “Admit that Robert [159] E. Coulson has been a director of defendant, The Western Pacific Railroad Company, since December 28, 1944.”

Mr. MacKinnon: And the Western Realty admits that also, your Honor.

* * *

Mr. Phleger: Fine. I now offer in evidence Plaintiff's Exhibit 40, consisting of two pages, the

first offer identified as intervener's exhibit 332 and the second sheet as intervener's 335. The first sheet is headed "Statement of counsel fees paid to Whitman, Ransom, Coulson and Goetz by the Western Pacific Railroad Company and/or Reorganization Trustees of the Western Pacific Railroad Company during the period 1943-1947. Paid by the Reorganization Trustees of the Western Pacific Railroad Company, 1945, \$22,500 for services rendered in connection with federal tax matters for the years 1940-1944." Then under the heading, "The Western Pacific Railroad Company, the year 1945, \$85,000 for services rendered to the Reorganization Committee of the Western Pacific Railroad Company. Also for the same year \$21,075 for services rendered in connection with federal tax [169] matters for years 1940-1945, 1946, \$20,750. For services rendered in connection with federal tax matters for the years 1940-1946, 1947, \$20,500 for services rendered in federal tax matters for the years 1940-1947.

"Note: The James Foundation of New York, Inc., has made no payments to Whitman, Ransom, Coulson and Goetz for any services rendered by Whitman, Ransom, Coulson and Goetz to the reorganization trustees, the Western Pacific Railroad Corporation and/or the Western Pacific Railroad Company or any of its subsidiaries."

I might state that the matter which I have just read is the foundation of the showing upon Plaintiff's Exhibit 2 of the total paid Coulson and Goetz, Whitman, Ransom, Coulson and Goetz and James K. Polk of \$129,325.

Mr. Adams: If your Honor please, I would just like to note on the record, as I think it is appropriate, that we have objected on the score of immateriality and want of relevance to the offer of evidence as made, and that we may have an exception noted to your Honor's ruling in that regard and also in regard to the production of the documents, so that our position may be protected on the record.

The Court: And with the reservation, I think you should note, of the right to strike it at a later date.

Mr. Adams: Very well, your Honor.

The Court: So you make a note of that now and there may [170] be some other matters of this kind. I gather from what counsel says it is not so much the amount of these fees, it is the circumstance of payment being made here and for what.

Mr. Phleger: Yes. It seems to me it is a very important factor that the entire tax matters——

The Court: No, I am not arguing against your position in the matter. I am merely saying I take it the purpose of the introduction of this is not so much any question as to the amount of the fees but as to the nature of the services for which the fees were charged and the period covered.

Mr. Phleger: Correct.

The Court: I gathered that from what you said.

Mr. Phleger: That is correct.

Mr. MacKinnon: If your Honor please, may the record show a similar objection with respect to the rights of the Western Realty Company?

The Court: All right.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 40.)

The Court: Does that complete the exhibit?

Mr. Phleger: Attached to it is a second sheet, a letter addressed to James K. Polk, c/o Whitman, Ransom, Coulson and Goetz, 40 Wall Street, New York, dated December 19, 1946:

"Dear Mr. Polk:

"Pursuant to my telegram of this date I am inclosing [171] our voucher no 120186 in the grand total of \$24,318.93 for the services of yourself and associates in connection with this company's federal tax matters, including miscellaneous expenses incurred by you in the amount of \$3,568.93. In accordance with our exchange of telegrams on December 16, the voucher in question is made payable to you."—(that is to Polk) and not to the firm.

"Very truly yours,"

The original is signed Charles Elsey, copy to Mr. C. P. Russell.

Will it be stipulated, Mr. Adams, that the sums paid shown by this memorandum included the sums paid by the Coulson firm to Mr. Curry?

Mr. Adams: No, that is a mistake. You will have the whole record. That would be an incorrect statement.

Mr. Phleger: You do not stipulate?

Mr. Adams: Your statement is incorrect, Mr. Phleger.

Mr. Phleger: I asked you if you would stipulate.

Mr. Adams: We might as well deal with the facts instead of just stipulate about things that are not facts. That is all I have in mind.

* * *

Wednesday, February 2, 1949, 2 P.M.

Mr. Adams: If your Honor please, if I may interrupt Mr. Phleger a moment in his case, I would like to recount compliance with the direction of your Honor for the production of the documents referred to upon the close of the session this morning. Referring to Plaintiff's exhibit No. 40 introduced this morning, there has been handed to opposing counsel the original bills for 1945, the first item, for 1945, the third item, for 1946, and for 1947, and in addition to that, an additional bill that was received by the railroad company subsequent to the date of the exhibit. There has not been handed the opposing counsel a bill in the amount of \$85,000 as indicated upon Plaintiff's exhibit No. 40, for the year 1945, for the reason that no such bill was rendered, that payment having been made pursuant to an allowance in the bankruptcy court.

Mr. Phleger: May it please the Court, I would like to add to Plaintiff's Exhibit 40 as a third sheet, a sheet which I neglected to attach when the exhibit was first offered. That sheet is also indentified as intervener's exhibit 336 and is a reply to the letter which is already a part of Exhibit 40. You will remember that that letter was a letter from Mr. Elsey to Mr. Polk transmitting the voucher for \$24,000

for services the year 1946, and concludes: "In accordance with our exchange of telegrams of December 16, the voucher in question is made payable to you." [173] That is to Polk.

The document which I now refer to and offer as additional sheet on Plaintiff's Exhibit 40, on the letterhead of Whitman, Ransom, Coulson and Goetz, December 23, 1946, signed by James K. Polk and addressed to Mr. Elsey:

"This acknowledges your letter of December 19, 1946, inclosing a voucher check for the amount of the statement sent you covering the services of myself and my associates in connection with the company's federal tax matters. You may be somewhat puzzled why my suggestion was that this check be drawn to me instead of to the firm. You will remember that my original retainer in the tax matters was by the trustees under Section 77 at a time when Mr. Coulson was one of the Reorganization Committee. The retainer was a retainer personal to me rather than a firm retainer, and in view of the current flood of litigation in behalf of the holding company, it seemed better to continue the professional relationship as originally established.

"With all good wishes of the season, I am

"Sincerely,"

I will now offer as one exhibit, being Plaintiff's Exhibit 41, the bills that have been furnished us by counsel in response to our request and which have just been mentioned by him as follows: The bills are four in number and I will tie them to [174]

Plaintiff's Exhibit 40. The first item, which is reported in the year 1945, \$22,500, as being paid by the reorganization trustees, is the first item of the exhibit. It is dated March 31, 1945, and is rendered in the name of James K. Polk, "To James K. Polk, c/o Whitman, Ransom, Coulson and Goetz." That is the first item shown on that exhibit.

The second item, skipping over the \$85,000 item just mentioned by counsel, is the bill for the year 1945. That is dated December 20, 1945, and is rendered to the Western Pacific Railroad Company. That is after the company came out of reorganization a year and covers professional services rendered during that calendar year.

Mr. Clark: In what amount, Mr. Phleger, please?

Mr. Phleger: \$21,075.

The next item is the bill for 1946, \$20,750, which is a bill rendered under date of December 13, 1946, to the Western Pacific Railroad Company by James K. Polk, c/o Whitman, Ransom, Coulson and Goetz.

The last item is that for 1947, of \$20,500 covered by a bill dated December 19, 1947, rendered to the Western Pacific Railroad Company, not by Polk, but to Whitman, Ransom, Coulson and Goetz. I ask that these be received and marked Plaintiff's Exhibit 41. I would prefer them as one exhibit.

* * *

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 41.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 42 a further bill which has been produced in response to the plaintiff's demand and which is not covered by Exhibit 40. I will read it. It is dated November 15, 1948. It is rendered to the Western Pacific Railroad Company by Whitman, Ransom, Coulson and Goetz. The statement is: "Final Statement covering professional services in connection with federal tax disputes as to the taxable period from January 1, 1942, through April 30, 1944." That is the period covered by the tax returns which are the subject matter of this litigation, and the amount of the charge is \$300,000. In addition to the \$300,000 charge for services is this item:

"Retainer payments, July 1, 1945, to December 31, 1948, to M. J. Curry, the President of plaintiff corporation, \$10,500, making a total of \$310,500."

Mr. Adams: If your Honor please, I would object to so much of counsel's statement with regard to this matter as this bill is not one mentioned in the exhibit which your Honor saw this morning, it being a patent fact that the exhibit was furnished to opposing counsel at a time long prior to the receipt of this bill. This bill has now been furnished to counsel, only recently received by the company, even though not requested [176] within the scope of the morning's request. Counsel has had the full information. I think it is wholly out of keeping for the imputation to be suggested that anything at any time has ever been withheld from opposing counsel with respect to the facts of this case.

Mr. Phleger: There is no suggestion and was none, Mr. Adams, on my part. I think you are taking something for granted that was not at all in my mind.

Mr. Adams: I am glad of that.

Mr. Phleger: It is perfectly obvious it was not included and I did not intend in the slightest way to suggest that it was covered by that statement. But it was covered by our demand.

Mr. Adams: I think that is also correct, and it has been produced.

Mr. Phleger: Correct. I will now offer in evidence the defendant's response to plaintiff's request 41A. Request 41A is:

"The Coulson firm was tax counsel for the corporation with respect to taxes for 1942, 1943, and the first four months of 1944, and served as such until August 1947." The response of the defendant railroad company is:

"Deny, except that they admit that Whitman, Ransom, Coulson and Goetz were employed by the reorganization trustees, namely, Thomas M. Schumacher and Sidney Ehrman, as tax counsel in connection with the federal tax return filed for the affiliated [177] group of corporations of which plaintiff was one for the year 1942-1943 and the first four months of 1944, and that Whitman, Ransom, Coulson and Goetz later employed by defendant, Western Pacific Railroad Company, as tax counsel, and that they continued to act as tax counsel for the affiliated group to and including August, 1947."

The response of the Western Realty Company is in substance the same.

Mr. MacKinnon: I think there is some change.

Mr. Phleger: Would you like me to read it?

Mr. MacKinnon: If you will, please.

Mr. Phleger: The Western Realty response is:

“Admits that Whitman, Ransom, Coulson and Goetz were employed as tax counsel by the reorganization trustees of the debtor in reorganization in connection with the federal tax returns filed for the affiliated group of corporations, of which plaintiff is one, for the years 1942, 1943 and the first four months of 1944, and that Whitman, Ransom, Coulson and Goetz were later employed by defendant as tax counsel when the assets and properties of the reorganization trustees became vested in defendant, and that Whitman, Ransom, Coulson and Goetz continued to act as tax counsel for the affiliated group of corporations in connection with the federal tax returns filed for the years 1942, 1943, and the first four months of 1944 to [178] August of 1947.”

(The document previously referred to was received in evidence and marked Plaintiff's Exhibit No. 42.)

Mr. Phleger: Before passing on to the next exhibit I would like to demand of counsel for the defendant the letter, if any, which accompanied the bill which I have just introduced in evidence.

I will next offer in evidence as Plaintiff's exhibit 43 an exhibit consisting of two letters on the same subject, which I will offer as one exhibit. The first

letter is identified as defendant's exhibit 448 and the second as defendant's exhibit 449. The first letter is on the letterhead of the Coulson firm, under date of July 25, 1944, and signed in the firm name and addressed to M. J. Curry, President of the Western Pacific Railroad Corporation, 37 Wall Street.

"Dear Mr. Curry:

"We have given the matter of adoption of declared value on the 1944 capital stock tax return for the Western Pacific Railroad Corporation consideration, after discussing with Miss Valouch and Mr. Reilly the present estimates of declared value excess profits tax net income for the calendar year 1944."

I do not think it is necessary to read the entire letter, but to call the Court's attention to a paragraph which states that the "best judgment of the company officers and employees would seem to be that there will be no declared value excess [179] profits tax net income derived by the corporation in the calendar year 1944. Accordingly it is believed that the capital stock tax return may properly reflect the declared valuation of zero for the Western Pacific Railroad Corporation."

I do not think there is anything else in the letter that is important.

The attached letter is signed by M. J. Curry, dated July 26, 1944, addressed to Mr. D. C. DeGraff, general auditor, the Western Pacific Railroad Company, in San Francisco; copies to Mr. James K. Polk, Mr. Frank C. Nicodemus.

“Dear Mr. DeGraff:

“After receiving copies of the 1944 returns of the capital stock tax which were inclosed with your letter of July 21, they were delivered to our tax counsel, Mr. James K. Polk of Whitman, Ransom, Coulson and Goetz for his review, having previously submitted to him for consideration the question of the capital stock returns. I am in receipt of a reply from his firm, copy of which I am inclosing for your information.”

Mr. Adams: There is a further paragraph in that letter.

Mr. Phleger: Do you wish me to read it?

Mr. Adams: If you please.

Mr. Phleger: “I am also inclosing 1944 return of capital stock tax for the Western Pacific Railroad Company and statement of the trustees, both executed by [180] Mr. T. M. Schumacher as trustee. We would appreciate it if you will send us conformed copies of all the returns filed for our records.”

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 43.)

Mr. Phleger: I next offer as Plaintiff's Exhibit 44 a sheaf of documents otherwise exhibited as intervenor's 213A, 213B and following to and including 213Z and 213AA, all dealing with the same subject. The top sheet of the exhibit is a typewritten memorandum dated July 26, 1944, addressed to Mr. Polk

and signed by the initials M.C.V., which I take it, counsel, you will stipulate as Miss Valouch?

Mr. Adams: Mary C. Valouch.

Mr. Phleger: "Herewith for your approval are proposed journal entries made up by Mr. Worden of Lybrand, Ross Bros. and Montgomery, who is entering the corporation books as of June 30, 1944."

In pencil is "M.C.V." At the bottom is the following:

"Returned July 27, with inked corrections, Mr. Polk stating that Mr. Coulson, Mr. Whiteside and he had approved with corrections noted."

I do not think that it is necessary to go through this exhibit except to point out that this exhibit has to do with the book entries on the corporation's books of the stock loss, which was the loss taken advantage of or used in the consolidated returns that produced this tax result.

Mr. Adams: May I object to the characterization again, your Honor? The documents will speak for themselves and are quite elaborate and, to my way of thinking, prove other matters besides the particular purpose which counsel has indicated was his purpose. I do not want to interfere too much with his presentation, but I suggest that when it comes to documents, counsel's characterization of the documents is going to be subject to dispute, and if we can have as little of that as possible, we will have a record with fewer interruptions.

Mr. Phleger: I am trying to save time, if the Court please, and I suggested it to counsel that if

by inadvertence or otherwise I omit something of importance, I wish he would call it to my attention.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 44.)

Mr. Phleger: The attached journal entries show the correction in ink which is mentioned by Miss Valouch's memorandum as being corrections by Mr. Polk:

"12-31-43, loss as result of reorganization of subsidiary's capital stock the Western Pacific Railroad Company \$75,796,400."

Mr. Adams: Are you reading the first page?

Mr. Phleger: Yes, 213B.

I direct your attention also to a written memorandum [182] identified as intervenor's 213K on yellow paper, signed M.C.V., dated July 26, addressed to Mr. Worden:

"Our lawyers feel that the tax should reflect the sale of collateral securities when they were sold in 1943, and was corporation property until date of sale. The balance of collateral unsold in 1944 was turned over to the creditors as of the date of the stockholder's meeting April 20, 1944, when the agreement with the three creditors was approved. The stock of the Western Pacific Railroad Company should be written down to \$1 as of the date of the Supreme Court decision approving the I.C.C. plan of reorganization."

That is this date (indicating on chart).

“Wherein the stock is declared worthless.” That date is March 15, 1943.

“A journal entry should be made to reflect that this stock, although worthless, is shown at \$1 to indicate that legal title to the stock was still held by the Western Pacific Corporation. Counsel would like to hear what journal entry is before entered in books (over phone) when the transfer was made of this stock to the reorganization committee on May 1, 1944.

“The dollar is written off, the advances to the Western Pacific Railroad Company are to be written off as of the Supreme Court decision on the W.P.R.R. Co. plan of reorganization [183] March 15, 1943, which states that unsecured claims are to be cancelled, Western Realty Stock, of course, to be treated as other collateral property of James Foundation of New York as of stockholders’ meeting dated April 30, 1944. The question of turning back the Standard Realty and Sacramento Northern advances (accommodation collateral) is on appeal with the Circuit Court of Appeals and should remain on books until order is issued.”

That shows the treatment of the loss. The loss was written off on March 15, 1943, as of the date of the reorganization, but the title to the stock was carried in the parent corporation until April 30 of the following year, during all of which period the technical affiliation continued which permitted, of course, the filing of the consolidated returns for that period. [184]

I will now offer as Plaintiff's Exhibit No. 45 four sheets otherwise identified as intervenor's 226, 225-A, 225B and 225C. The first sheet is a telegram from M. J. Curry to Robert E. Coulson in San Francisco dated March 26, 1945, and reading as follows:

"Delaware Tax Board has granted extension to July 1, for payment delinquent franchise tax. Have up with Mr. Polk question preparation petition for redetermination franchise taxes for 42 and 43, which must be filed by March 29."

Those, if your Honor please, are franchise taxes of the parent corporation, no one else. The subsidiary corporations have no interest in those.

The second sheet consists of a letter on the letterhead of the Coulson firm, signed by J. B. Robinson, who is one of the partners of that firm, as shown by the letterhead, dated March 27, 1945, and addressed to M. J. Curry, Vice President of the Western Pacific Railroad Company, not the corporation, 37 Wall Street:

"Dear Mr. Curry:

"Pursuant to your letter to Mr. Polk of March 23, 1945, I have prepared and enclose herewith a petition for commutation of franchise tax in respect of the Delaware franchise tax of your corporation for the calendar years 1942 and 1943. The annual reports, financial statement and correspondence which Miss Valouch furnished me in this connection are returned herewith."

The last two sheets are copies of the petition for commutation of franchise tax of the State of Dela-

ware, of the [186] Western Pacific Railroad Corporation, referred to in the previous letter. I will read the last two paragraphs of the last page. This is the rider to the petition:

“In support of this appeal, reference is made to petitioner’s letter of March 27, 1943, addressed to the State of Delaware, State Tax Department, 843 King Street, Wilmington, Delaware, which contained a detailed statement regarding the bankruptcy of the two railroads, securities of which constituted practically the entire assets of the petitioner.

“On the basis of this letter, the State Tax Board, under date of April 9, 1943, granted the one-half tax rate for the years 1940 and 1941, and reduced statutory interests from 12% to 4% per annum.

“There has been no improvement in the financial condition of the petitioner since the foregoing letter. On the contrary, the reorganization of the Western Pacific Railroad Company, one of the two railroads referred to above, has now been completed. The petitioner now has no securities of any kind in this railroad except a nominal amount of common stock issued in the reorganization, having a value of less than \$300.

The petitioner at all times since the bankruptcy of said two railroad companies has been inactive and unable to carry on its normal functions.”

That is the language of the petition prepared by the Coulson firm for the plaintiff corporation.

The Court: Now, what do you suppose they meant by that?

Mr. Phleger: They meant that the plaintiff corporation——

The Court: Or is that just an argument that counsel made?

Mr. Phleger: No, I think it was a very fair statement. I think the plaintiff was in a state of corporate coma.

The Court: Well, he said they were unable to act. I don't know what that means.

Mr. Phleger: The last two sentences there make it clear that it is unable to carry on its normal functions.

The Court: Well, I might say that that comes to me like an argument that attorneys make to get the tax changed.

Mr. Phleger: That may be.

(The documents referred to were received in evidence and marked Plaintiff's Exhibit 45.)

Mr. Phleger: I now offer as Plaintiff's Exhibit 46 the minutes of the Western Pacific Railroad Corporation, which are otherwise identified as Intervenors' 253.

(The minutes referred to were received in evidence and marked Plaintiff's Exhibit 46.)

Mr. Phleger: I will only read two paragraphs from this, because I don't think that the balance is important.

(Exhibit 46 examined by Mr. Adams.) [188]

Mr. Phleger: The following appears in those minutes, and these are the minutes of the meeting on July 31, 1945, of the corporation:

“The Chairman reported that on advice of Whittman, Ransom, Coulson & Goetz, Tax Counsel, the corporation declared a zero value on its 1945 capital stock tax return for the year ended June 30, 1945, and that he, as President, had executed and filed such return with the Collector of Internal Revenue at Wilmington, Delaware; on motion duly made and seconded, the action of the President in filing the declaration recommended by Tax Counsel be and the same is hereby approved.”

Mr. Clark: Mr. Phleger, may we have indicated the persons present at that meeting?

Mr. Phleger: There were present at that meeting the following directors: M. J. Curry, W. W. Hatton, A. Perry Osborn, T. M. Schumacher, M. C. Valouch, John F. Wienken, Willis D. Wood, constituting a quorum. Also present were Mr. F. C. Nicodemus, Jr., of counsel; Miss M. C. Valouch acted as secretary.

Mr. Adams: Occasionally reference is made to “Mr. Nicodemus, Jr.” and then occasionally without the “Jr.”; but may it appear it is the same gentleman at all times that you have reference to?

Mr. Phleger: Yes. [189]

Mr. Clark: In spite of his various capacities.

Mr. Phleger: It is so stipulated.

May it please the Court, I would now like to offer in evidence Plaintiff's Exhibits 1 and 2, all the

material on them having been shown by other evidence.

The Court: Well, they are only for illustrative purposes?

Mr. Phleger: Correct.

Mr. Adams: In this state of the record, I would have several objections to make to the receipt in evidence of these documents, and I suggest that they may remain until a later date and we can fully develop whatever inaccuracies there may be, as we believe there are. Or perhaps you may be able to establish to his Honor's satisfaction that they are not inaccurate in the respects that we may suggest.

Mr. Phleger: Well, of course, as your Honor pointed out, they are for illustrative purposes only, and for convenience. They are not binding on you as separate evidence. I think it would be a convenience at this time to put them in, because we would like to reproduce them.

Mr. MacKinnon: Well, your Honor, my position is that the documents have not been established, and until they are established, I don't think they are properly received; and I think as the evidence unfolds it will be demonstrated that they are not accurate.

Mr. Clark: Well, your Honor, may they be received simply [190] for the purpose of illustrating the evidence which has thus far been admitted, without any probative effect?

Mr. MacKinnon: I think even then, your Honor, until they are properly qualified as competent and relevant——

Mr. Phleger: Well, let's argue that out now, then, gentlemen.

Mr. Clark: Well, the proposition is, they have been authenticated and qualified.

Mr. Phleger: We have covered every single item on that. He may dispute our evidence, but the fact is that our evidence supports every single item on those charts. They have no probative effect. The evidence itself is the evidence, but we think we are entitled to introduce those two exhibits as illustrative.

The Court: Well, you mean really that they are a summary of what you have brought forth?

Mr. Clark: That's right, without any simple probity to the fact, except the evidence that supports them and is already in—simply as a convenience to the Court and counsel and all parties.

The Court: Well, of course you don't really need them in evidence. They are here, and as you say, it is a summary. If it isn't correct, if it isn't a correct summary, the other side will correct you in it. I don't know that it adds anything particularly to the record to introduce it in evidence. [191] I will consider that counsel wants the Court to look at it as a summary and if they do want me to look at it as a summary, I will do so. If the other side says it isn't correct, they can correct it. I don't know how it adds to the record, in any way. But it is here and the record will show that the Court now has in front of it these charts as a summary of the evidence, the Court has been looking at it, my atten-

tion has been called to it by counsel, and I will continue to look at it; and counsel on the other side can point out any respect in which it is inaccurate.

Doesn't that take care of it?

Mr. Phleger: I take it also that having been identified, that this would go along with the record in this case for the purposes which your Honor has just stated?

The Court: Yes, it would be a part of the record. I guess that might be said to be correct.

Mr. Clark: Well, that was my only point of suggesting that, your Honor.

The Court: It would be not necessarily as proof of any fact therein stated.

Mr. Phleger: That's right.

Mr. Adams: This is marked for identification, so it may well be considered that they have been marked for identification as the documents to which plaintiff's counsel have from time to time addressed themselves. [192]

The Court: Well, do you think that there is some inaccuracy there?

Mr. Adams: Oh, yes, your Honor. I expect, when we get our time to talk, that we will be wanting to point out things that are inaccurate in that presentation.

The Court: I suspect what you mean is that they are inaccurate because they draw conclusions you do not from the evidence?

Mr. Adams: And I think what our purpose will be, will be to indicate that there are material re-

spects in which those documents are missing something that should be there in order for a fair statement to be in the record.

The Court: You mean certain people there were not occupying positions at the times stated?

Mr. Clark: I don't think Mr. Adams could make any contention such as that, your Honor; I think it has something to do with the railroad defendants' interpretation of these very positions. I think factually there is no doubt but what these charts are accurate. I don't think that will be disputed.

Mr. Adams: I don't want to take up the Court's time at this time, beyond suggesting that I do think I am going to find fault with those presentations.

The Court: I will reserve ruling on admitting this in evidence, and you can fight it out later on.

Mr. Phleger: I will now offer in evidence as Plaintiff's [193] Exhibit 47 minutes of the board of directors, of the corporation itself, meeting on Tuesday, March 23, 1943. That meeting, as you will note by reference to our chart, was shortly after the decision of the United States Supreme Court upholding the reorganization as proposed by the ICC.

(Minutes dated March 23, 1943, referred to were received in evidence and marked Plaintiff's Exhibit 47.)

M. Phleger: I will only read the portions that appear to me to be pertinent.

Mr. MacKinnon: Will you describe the date of the minutes?

Mr. Phleger: Yes. March 23, 1943, and the document is otherwise identified as Interveners' 194.

Mr. Clark: The other markings are from the New York litigation, I think—the plaintiff's.

Mr. Phleger: I read from the fourth page:

“Counsel for the Corporation was requested by the Chairman to report upon the decision of the United States Supreme Court handed down on March 15, 1943, in the Western Pacific Railroad Company reorganization proceedings, reversing the judgment of the Circuit Court of Appeals and affirming the order of the District Court which had approved the plan of reorganization certified to it by the Interstate Commerce Commission. In [194] outlining the scope of the decision, counsel pointed out that the Supreme Court had approved the finding of the Commission that unsecured indebtedness, as well as the capital stock of the railroad company, was without value, and expressed the belief that a motion for reargument would be fruitless, inasmuch as the Court had not overlooked any substantial question involved in the case, but had passed upon all such questions. The effect of this decision upon the corporation's future was considered by the Board, and counsel submitted a draft of the proposed communication to the corporation's three principal creditors, advising them of said decision of the Supreme Court and inquiring whether it was their desire that the corporate status of the corporation should be preserved, or that the corporation be liquidated immediately and without judicial proceedings, and whether they are pre-

pared to advance the funds necessary to preserve the corporate status or liquidate the corporation.

“Whereupon, after full discussion, the President was directed to forward to said three principal creditors a communication in substantially the form submitted to the meeting, and a copy of said communication was ordered to be annexed to and made a [195] part of the minutes of this meeting.”

The attached copy of the letter is on the letter-head of the Western Pacific Railroad Corporation, dated March 23, 1943, and signed by M. J. Curry. It is addressed to Mr. William W. Carman, and the United States Trust Company, Executors of the Estate of Arthur Curtis James; the Chase National Bank; Central Hanover Bank and Trust Company:

“Dear Sirs:

“Each of you is a creditor of this corporation as of January 1, 1943, in the amounts shown in the schedule set out below, except as your claim may have been reduced by application of the proceeds of sale of certain of the collateral.”

And then there is the schedule of the indebtedness.

“On March 15, 1943, the United States Supreme Court released the opinion in the proceedings for the reorganization of the Western Pacific Railroad Company and the companion proceeding for the reorganization of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, in which it held that the capital stock of each of these two com-

panies had properly been declared to be worthless by the Interstate Commerce Commission, and that the action in each case of the District Court in affirming the finding so made by the Interstate Commerce [196] Commission was correct.

“At the expiration of 25 days from the date of the decision, a mandate will issue to the District Court directing it to take further proceedings consistent with the decision of the United States Supreme Court.

“The only asset of this corporation which could be utilized to further collateralize your loans is 283,000 shares of preferred stock and 475,000 shares of common stock of the Western Pacific Railroad Company, held unpledged in the treasury of the corporation. The common stock has been delisted by the New York Stock Exchange, but trading continues on the exchange in the preferred stock, and from day to day certificates in substantial amounts are presented for transfer into the names of purchasers.

“The corporation is without funds to continue its corporate existence, and the Board of Directors has directed the undersigned to communicate with you with a view of obtaining the following information: 1. Do you desire the corporate status of the corporation to be preserved, or do you desire to have the corporation liquidated immediately and without judicial proceeding? 2. Are you prepared to advance the funds necessary to preserve the corporate status or liquidate the corporation?

“Your prompt advice in the premises will be greatly appreciated.

“Very truly yours,

“M. J. CURRY.”

Mr. Adams: I suggest it be stated, and I think all counsel would agree, that in the paragraph which refers to the only asset of the corporation as certain shares of preferred stock and certain shares of common stock of the Western Pacific Railroad Company, that that reference is as stated to the railroad company's stock. The next paragraph, which refers to the statement, “the common stock has been delisted, but trading continues on the exchange in the preferred stock,” I understand to refer to the common stock and the preferred stock of the holding company.

Mr. Clark: That is correct.

Mr. Phleger: It will be so stipulated.

Mr. Adams: Counsel, do you desire to read the last few lines? I interrupted you. The last few lines in the minutes, which follow after the letter which you had just read into the record.

Mr. Phleger: Well, I don't think they are of any importance, but I will be glad to do so if you wish.

Mr. Adams: They are relevant to your presentation.

Mr. Phleger: Well, they are part of the sentence: “Upon [198] motion duly made, seconded and carried, the meeting was adjourned, to be re-

convened upon receipt of reply from said creditors to the aforementioned communication.”

And then it is signed by John F. Wienken, Secretary, and approved by M. J. Curry, Chairman.

Mr. Adams: Would you read into the record, please, the names of the persons present at that meeting of the board of directors of the parent company?

Mr. Phleger: Those present were directors Campbell, Curry, Hatton, Osborn, Schumacher, Wienken, Wood,—by the way, their names are shown on Plaintiff’s Exhibit 2—constituting a quorum. Mr. Nicodemus, Jr. of counsel was also present.

I will now read an admission from defendants’ brief, page 4:

“Its”—meaning the corporation’s—“only other substantial asset was a one-half interest in the stock of the Denver Rio Grande and Western Railroad. The holding company’s only remaining substantial asset, its stock interest in the Denver Rio Grande and Western Railroad, was also subsequently determined to be without value in reorganization before the ICC.”

That last was from pages 8 and 9 of the brief.

I now offer as Plaintiff’s Exhibit 49, otherwise identified [199] as Interveners’ Exhibit 10, a letter on the letterhead of the Coluson firm, signed by Robert E. Coulson, dated April 12, 1943, addressed to M. J. Curry, President, the Western Pacific Railroad Corporation; in reply to the form of letter which I have just read:

“Dear Sir:

“On behalf of the executors of the estate of the late Arthur Curtiss James, we are instructed to advise you in reply to your letter of March 23, 1943, that the claim of the Curtiss Southerwestern Company against your corporation, which was one of the assets held by the executors, has been transferred to the James Foundation of New York, Incorporated, as residuary legatee under the will of Arthur Curtiss James. We are further instructed to advise you on behalf of the James Foundation of New York, Inc., that the trustees of the Foundation do not feel justified in authorizing any advance from the Foundation to your corporation for the preservation of the corporate existence of your corporation.

“The trustees of the Foundation would, however, be prepared to consider any specific proposal that was made on behalf of your corporation to facilitate its prompt liquidation by the release [200] of any deficiency claim against your corporation, in consideration of the surrender by your corporation of any rights which it might have in the collateral held by the Foundation.

“If there were included in any such proposal a participation by the Foundation in the payment of any necessary State tax charges involved in the dissolution of your corporation, this element would be considered by the trustees of the Foundation as a part of the general proposal. Any such proposal, however, would need to state specifically and accu-

rately the amount of payment by the Foundation which was contemplated.”

Mr. Clark: That is Plaintiff’s 48, Mr. Phleger.

The Clerk: You stated it was 49.

Mr. Phleger: 48 was correct. I am sorry.

(The letter dated April 12, 1943, referred to above, was received in evidence and marked Plaintiff’s Exhibit 48.)

Mr. Phleger: I will now offer as Plaintiff’s Exhibit 49 a letter otherwise identified as Defendants’ No. 67, on the letterhead of the Coulson firm, signed by Robert E. Coulson, dated May 1, 1943; subject: Western Pacific. It is addressed to F. C. Nicodemus, Jr., Pierce & Greer, New York:

“Dear Mr. Nicodemus:

“This morning I received your letter under date of April 30, enclosing a copy of a proposed petition, which I understand you are filing Monday with the District Court in San Francisco.

“It does not seem to me that your petition will serve any useful purpose, and I assume that you are filing it under what you deem to be, as set out in your petition, your statutory duty of representing all interested parties throughout the proceeding.

“Your petition presents an interesting divergence in your prayers for relief, in that in behalf of the equity you are asking for a reopening of the proceeding, and in behalf of certain bondholders not previously represented, you are asking an immediate confirmation of the Commission plan.

“At a meeting last Thursday of the insurance group with the three junior creditor groups, it was definitely decided to abandon any effort to modify the Commission plan and to work wholeheartedly for a prompt consummation of the plan. This necessarily involved a withdrawal of the petition previously filed by those parties with the District Court asking deferment of certification.

“It is my impression that Judge St. Sure is likely to deny your petition promptly.”

The date of that letter is May 1, 1943, which is a month [202] and a half after the Supreme Court decision.

(The letter of May 1, 1943, referred to above, was received in evidence and marked Plaintiff's Exhibit 49.)

The Court: What was the petition?

Mr. Phleger: That was a petition for rehearing.

The Court: I mean, on the general ground that some equity should still be allowed the plaintiff?

Mr. Adams: No, your Honor. We might as well get the record straight about this. There was no such petition ever filed. That is one thing that is apparent from the record. Another thing is that there was a petition filed by the senior creditor group, to which reference is made in the letter just read. I think if documents of this sort are going to be produced, it would be well to have them tied into the part of the record to which they refer and have clarity when it comes to statements which are not a part of the record.

Mr. Phleger: Well, now, just a moment. The reference in this letter is to a petition by Mr. Nicodemus, and the fact is that Mr. Nicodemus' petition to the District Court was for the purpose of inducing the Court to give some recognition to the equity.

Mr. Adams: The petition was never filed.

Mr. Clark: It was never filed.

Mr. Phleger: I know, but that was the purpose, even though the petition was not filed. [203]

Mr. Adams: Well, let's have the record clear that that petition was a draft petition which was never filed.

Mr. Phleger: That's right, but it was for that purpose, was it not?

Mr. Adams: Let's have the petition speak for itself.

Mr. Phleger: Can't you stipulate that that is what it was?

Mr. Adams: I am very much more interested in having the true facts before your Honor. If there is going to be a discussion about this matter, it can be shortened a great deal if the thing itself is proven.

The Court: Well, all I want to find out is what the petition was. It was a proposed petition which was not filed, in which some relief was being asked?

Mr. Clark: Correct. It was a proposed petition which was sent out here for filing, but on further consideration was not filed, seeking to defer certification, or in other words, reopen the proceeding

for the purpose of getting a higher valuation on the properties than the ICC had placed on them in 1939. In general, your Honor, it was a petition seeking relief for the holding corporation from the standpoint of possibly getting it some equity in the debt.

Mr. Adams: Granting to all counsel, as I do, of course, complete candor,—and the purpose I have is to be completely candid in regard to this—we are going to have trouble, [204] regardless of our own statement, for matters that are readily open to proof by precise documents. Now, in this case, it may be that it will be unnecessary to discuss this petition further. But if it should be necessary, if other counsel then do not bring the facts to your Honor, we will do so.

The Court: Of what importance is this, anyhow?

Mr. Adams: That I don't understand myself, but counsel brought it in.

The Court: Just what has this got to do with the case?

Mr. Phleger: You mean the contents?

The Court: Well, the letter, the petition; the Coulson firm writes a letter to Nicodemus. What do I care about that in deciding whether or not the holding company has got some rights?

Mr. Phleger: It is submitted as proof, your Honor, of the thing that I think is very important, and that is that shortly after the Supreme Court decision, the parent corporation was without funds and was in a state of corporate coma, and that Mr.

Coulson, who represented the largest creditor or one of the largest creditors, who had previously been active in supporting a claim for an equity for the parent corporation, advised Mr. Nicodemus that he would make no further effort, but would use his efforts for the prompt consummation of the plan of reorganization. And the probative effect of it is that it became hopeless at that moment for the parent [205] company to attempt to further claim an equity, because the principal creditors who had previously backed its claims, and the largest single stockholder, advised the corporation that thereafter it would use its efforts to carry out the plan which denied the parent company any equity. It seems to me it is very important as proving the fact that this corporation from this date on was in a state of corporate coma. It had no assets, it had no hope of preserving its equity, and the reason it didn't is that the principal parties who previously had furthered its claims for equity now gave word or said word that they no longer would attempt to preserve an equity but would work for the carrying out of the plan.

The Court: Well, the Supreme Court already said the stock was worthless.

Mr. Phleger: Yes.

The Court: What could they do about it? What difference did it make what those attorneys said between on and the other? As a matter of fact, as I understand the presentation so far, there is no question about the fact the holding company didn't have any more assets and it was wiped out—that is,

wiped out effectively, practically, even though the District Court didn't confirm the plan until a later date. It was effectively wiped out, practically wiped out, by the Supreme Court's approval of the plan.

Mr. Phleger: That is exactly—— [206]

The Court: So what is the materiality of this?

Mr. Phleger: That is exactly what we are proving. But, your Honor, there is a further point, and perhaps in an excess of caution we are not covering this. That is that it was necessary after this, and after the District Court approved the plan, confirmed the plan, that it be voted on by the creditors. And these people were large creditors of the subsidiary company, and by not voting for the plan they could still have upset the plan, because while the plan was confirmed by the Court, it required the approval of the creditors, and I intend to offer now the formal resolutions by these creditors, who, had they chosen to do it, could have stopped the reorganization at least temporarily by not voting for it. They could have forced the consideration of a further plan. But they now gave definite indication that they were through and would work actively for the consummation of the plan.

The Court: Well, you mean *the the* holding company could, by virtue of its position as a creditor, by voting against it, stop it?

Mr. Phleger: No, not the holding company, but these creditors to whom the James interset, for instance, that was a large creditor of the railroad company,——

The Court: Well, the only effect of that would have been that there would have been an adjudication in bankruptcy.

Mr. Phleger: No, it would probably have resulted—— [207]

The Court: I don't think that the creditors, or any person, be it creditor or otherwise, by refusing to vote for a plan that had been confirmed could do anything else except bring about the plaintiff's——

Mr. Phleger: Well, the confirmation, I think, came after the voting on the plan. The confirmation by the Court came after the voting by the creditors.

Mr. Adams: It is the law, however, your Honor, that if the Court had desired, it could confirm the plan over the adverse vote of the security holders, had the vote been adverse.

Mr. Clark: Well, may it please your Honor, so far as the interveners are concerned,——

The Court: Well, perhaps we are spending too much time on discussion in this matter now. It just occurred to me to wonder as to the materiality of these letters between attorneys. Mr. Phleger has explained it in a way, that it was in connection with whether or not they were going to take any further steps with respect to changing their vote as to participating in the plan. But it may be a factor in the chronology. I don't know whether it is of any importance or not.

Mr. Clark: No. The only relevancy is, your

Honor,—although we don't think it is the strongest evidence on the point—is that it shows that the James interests, likewise represented by Mr. Coulson, committed themselves to the railroad company as against the holding company. And from that [208] time on this whole pattern advantages the railroad company to the disadvantage of the plaintiff corporation. That is the point.

Mr. Adams: Your Honor,—

The Court: Well, the District Court hadn't confirmed the plan yet.

Mr. Clark: I know, may it please your Honor, but the plan and this failure to file a petition—

The Court: Well, when you are talking about the railroad company, who are you talking about at this time?

Mr. Clark: The railroad company is the defendant in this case, your Honor.

The Court: Yes, but the railroad company that is defendant in this case is the railroad company that came into being, as I take it, after the end of December of 1944.

Mr. Clark: No, your Honor, it is the same railroad company and has been since 1917. It is the same corporation.

The Court: Well, you mean not the same corporate form, or, rather, you mean the same corporate form but it is not the same railroad company so far as who owns the railroad company goes, is it?

Mr. Clark: It is the same railroad company so

far as its corporate structure, so far as its assets. It is now in the hands of the creditors.

The Court: That is just a formality. It is not the same [209] people owning the railroad who owned it before.

Mr. Clark: Well, this holding company did not own it at that time, that is quite correct.

The Court: Someone else came into the ownership of the railroad company.

Mr. Phleger: Well, someone who had been a creditor theretofore.

The Court: Well, it is a different owner, so it is a different company. I don't care whether it is the same name or not, it is a different company. Smith doesn't own it any more; Jones owns it.

Mr. Clark: That is quite correct, as soon as the reorganization was completed, your Honor. But as of this time, the time that the evidence pertains to,—

The Court: Well, then, it is not the same railroad company, in fact, or the same owners of the railroad company, in fact, that you are talking about in the period of 1943, the period before the Court in this case, is it?

Mr. Clark: That is correct, your Honor.

Mr. Phleger: Well, if your Honor please, after all, every act of the reorganization trustees and every act of the reorganization committee was for the benefit of this present defendant. It is possessed of its assets, it assumed the liability, including counsel fees, for the handling of this tax mat-

ter; and whether or not you say it is the same corporate entity or [210] not, it is in fact the same corporate entity, but it is the successor to the liabilities and the assets and so forth that were for a time in reorganization. And they are the beneficiaries of all of the acts that we are talking about, those that took place in reorganization as well as those that took place thereafter.

The Court: Well, we are getting now into a discussion of the merits of the case, and I didn't intend that. It was merely in connection with the statement that Mr. Clark made as to the relevancy of these communications between the attorneys in May 1943; and Mr. Clark had made the statement that that was on behalf of the defendant. Well, as a matter of fact, it wasn't the defendant that is before the Court now, at that time.

Mr. Phleger: Oh, yes, your Honor.

Mr. Clark: Let me make a statement.

Mr. Phleger: May I interrupt for just a moment?

Mr. Clark: Yes, surely.

Mr. Phleger: The purpose for which we are introducing them is to show that as of that date, which is early in 1943, that the declaration of the only people who could further and make effective efforts to stop the consummation of the plan, that they had decided and so communicated to the corporation, that they would make no further such efforts, but that they thereafter would use their best efforts to carry out the [211] plan which wiped out

the equity. And that has, I think, a very effective bearing upon the condition of the plaintiff corporation and the time of its loss and its mental attitude and its ability to look after itself. That is the purpose for which we are putting it in.

The Court: Well, I don't attach too much to that. There is so much more that you have in the case that is so very much more important, that I don't see much point to some of this matter that you are now putting in.

Mr. Phleger: Well, if your Honor thinks that we have proven it sufficiently, we will not labor the point.

The Court: Well, don't take that attitude. I haven't studied these exhibits like you have.

Mr. Phleger: Well, I perhaps have cumulated some of the evidence here, but that is our point, that from here on there was no hope of the preservation of the equity, because the interests represented by Mr. Coulson had determined that thereafter they would work for the consummation of the plan, and so advised the corporation.

The Court: So far as I can see, up to this point, in the introduction of these various exhibits, irrespective of what interpretation either side may put on them, there doesn't seem to me to be much of a factual question here or that there is going to be presented in this case much of a factual question. It looks like it is pretty much a question of law, from the very beginning.

Mr. Phleger: Well, I think so too. I agree with

you. And that is why we are putting this in the form of documentary evidence.

The Court: Well, I am not intending that that statement necessarily is in favor of your side of the case, Mr. Phleger, but it just looks to me as if the whole chronology so far in this thing is not going to be dependent upon whether I have to accept anybody's statement as against anybody else's statement as to what happened in this matter.

Mr. Phleger: That is why we put it in in the form of documentary evidence. We think that that is the way to go at it.

Mr. MacKinnon: Well, your Honor, I think that that is true as far as the bare essential facts are concerned. I haven't any doubt that it can be stipulated on our part. But of course, as the record is being made, it will have to be amplified, because this is only a selection of documents, and a very limited selection.

Mr. Phleger: I think we will find that they are a very fair selection. They purport to be, or are intended to be,—

The Court: Maybe this is a good time to take a little recess.

(Recess.) [213]

Mr. Phleger: I will next offer in evidence as Plaintiff's Exhibit 50 a letter otherwise identified as intervener's 185. This is a letter on the letterhead of the Coulson firm signed by James K. Polk dated May 20, 1943, addressed to M. J. Curry, Vice

President of the Western Pacific Railroad Company, 37 Wall Street. This letter has become known as the paradoxical letter, and so far as any written communication, that is, letter is concerned, seems to be the first time in which the use of the stock loss of the parent for reducing taxes was suggested. The date is May 20, 1943, which was two months after the Supreme Court affirmed the plan. I will not read the entire letter because I think most of the contents are not particularly illuminating. It is addressed to Mr. Curry, and then on the bottom of page 2 is this paragraph:

“It may also be noted that it is clearly demonstrable that the consolidated return basis of reporting for the year 1942 as contrasted with a separate basis of reporting, was advantageous to the group. Since consolidated returns were filed for 1940 and 1941, any unused excess profits credit inherited in the common parent corporation, had separate returns been filed for 1942. A preliminary survey of the smaller affiliates indicates that they would have incurred no excess profits tax liability. The operating company, however, if placed on a separate basis without the benefit of the credit carry-overs, [214] would have been liable for a net excess profits tax liability of \$3,650,000 even if all other figures as shown in the return were left unchanged. This amount is offset by several factors. In the first place, on an individual basis, the operating companies’ interest on expense deductions would have increased \$705,000. It would have lost,

however, its allocable share of the net operating loss reduction of approximately \$438,000. Further, a portion of its earnings subject to excess profits tax rates would have been eliminated from normal tax rates. There would have been, in addition a reduction in the surtax rate on a separate basis of the 2% penalty for filing a consolidated return, which would have amounted to approximately \$200,000 in tax. All of these factors combine to establish a net tax advantage of in excess of \$1,550,000 in the adoption of the consolidated return under the separate return."

I think he meant over the separate return. That, as your Honor will note, does not discuss the use of the 1942 return, which was to be filed a little bit later.

Mr. Clark: The use of this loss. This is the provision, however, which does discuss that.

Mr. Adams: The 1942 return had been filed at the time this letter was written. [215]

Mr. Clark: Yes, five days before.

The Court: It was a consolidated return.

Mr. Phleger: A consolidated return.

The Court: But it had not made the claim for the loss.

Mr. Phleger: That is right.

"There is a further possibility of adjustment under the internal revenue code provisions contained in Sections 23(g)(4) and (k)(5) by which the worthlessness of the operating company's stock may produce a net loss for the year 1943 with pos-

sible carry-back applications. This is commented upon rather than suggested as of certain value, since it is paradoxical to compute a loss upon the operating company's stock which, through the mechanics of consolidated return reporting, could be used to nullify the very income of the affiliate whose stock had become worthless. This matter will receive more careful consideration when the completion of the reorganization makes possible the assertion of the claim for worthlessness of the operating company's stock."

There are some pencil notes on this one:

"Mr. Schumacher, to note, M.J.C.," that is Mr. Curry. And then addressed to "M.J.C.: interesting letter. T.M.S."

Mr. Levy: Very interesting.

Mr. Phleger: No, there isn't any "very" on it, just "interesting." [216]

Mr. Adams: "T.M.S." being Mr. Schumacher's initials and his endorsement.

Mr. Phleger: Correct.

(The letter referred to above was thereupon received in evidence and marked Plaintiff's Exhibit 50.)

Mr. Adams: I think since the document itself is the original paper and the Court may wish to examine it, and because this is a document of interest to all counsel in this lawsuit, I believe it would be proper to observe at this point that Mr. Schumacher had the custom of endorsing his comments

in a blue crayon pencil while Mr. Curry had the custom of marking his notations in a green crayon pencil, and this document is one of several which has those characteristics, and the Court, when seeing the markings, will understand whose markings they are and how they came to be there. [217]

* * *

Mr. Phleger: The next document which I shall offer as Plaintiff's Exhibit No. 51, otherwise identified as intervener's 60, is a typewritten memorandum from R. R. Coulson—that is Mr. Coulson—to J. K. Polk—that is Mr. Polk—denoted “urgent, June 26, 1943,” reading as follows:

“Will it embarrass in the Western Pacific situation if the corporate charter of the Western Pacific Corporation is cancelled by the State of Delaware by failure to pay its 1940 Delaware franchise tax prior to July 1, 1943?”

That is the parent corporation. On the bottom in ink, in the handwriting of Mr. Polk, signed with his initials, is the following, addressed back to Coulson:

“Until the revised provisions we are urging for incorporation into the internal revenue code are adopted, it is essential to protect the possible use of the net loss carry-back that the holding company continue until the consummation of the reorganization. It would require more study of the consolidated return regulations before all the advantages of continuation of a charter beyond June 30 can be noted.”

Mr. Adams: Counsel, the document just offered carries with it also a further notation to which I direct your attention.

Counsel refers to what is evidently a longhand endorsement [218] on the last exhibit reading "see letter May 26, 1943 from F. C. Nicodemus, Jr., which is intervener's exhibit 31A, and I desire to inquire whether counsel desires, in order that this record may be complete, that intervener's exhibits 31A and B shall be produced at this time, being part of this same record?"

Mr. Phleger: We do not propose to introduce them but if you would like them, we would be glad to put them in.

Mr. Adams: That is satisfactory to us, your Honor.

Mr. Phleger: I rejected them, because what I was trying to prove here was the interest of the tax attorneys in the preservation of the corporate charter of the parent corporation in connection with the tax matters. Now, if you would like the others then, if you will let me have them, I will put them in right now.

Mr. Adams: I take it Mr. Dickerson is in possession of the documents.

Mr. Phleger: Yes.

The Court: Suppose, Mr. Phleger, that the attorneys and tax attorneys for the company in reorganization for the trustees were total strangers to everyone concerned: wouldn't it be proper, and within the orbit of their activities, in aid of the estate, to accomplish a saving for the estate?

Mr. Phleger: Yes, but we have proved already and we will prove further they were at the same time acting as counsel for the parent corporation.

The Court: What is the significance of that?

Mr. Phleger: The significance of that is if there arose any duty by the parent corporation to have taken any action at that time, why then, the fact that it was represented by a common counsel that was giving legal advice in the tax matter, it would mean it could not be expected to take such action except with the advice of such counsel. In other words, the duality of legal representation of the two parties is shown by the fact that common counsel, common tax counsel for both was advising the parent corporation with respect to matters involving the continuance of its corporate charter.

The Court: Does it make any difference that the parent company had other assets than the ownership of the Western Pacific Railroad Company?

Mr. Phleger: Only it is evidence, and we think it is of some importance, with respect to charges of its inaction, and so forth, that it was without assets. It was struggling even to maintain its existence.

The Court: What bearing would that have in the matter? Suppose it was an individual who owned all of the stock of the Western Pacific Railroad?

Mr. Phleger: It has this very important bearing in the light of very obvious defenses which counsel for the defendant is constantly raising, that there

was some duty or obligation on the part of the parent corporation to step forward and do [220] something. Now, our position in that there was no such obligation or duty, of course, on its part. If it had a right it would not lose it because it did not act. But the defendant seems to think otherwise. He seems to think that the plaintiff was under some active duty to step forward and assert his rights, demanding this, that and all the rest, and we are showing it was in a state of corporate coma and it was represented at that time and taking tax advice from counsel who were employed and paid then at that time by the reorganization trustees and later by the reorganized company, and we think that is a very significant factor in judging whether any of the rights of the plaintiff arising out of the situation could have been lost to it by its inaction.

Mr. MacKinnon: Your Honor, I do not think that states the position of counsel for the defendant. It is our position they did not have any claim under any such a state of facts; that if they had a claim, that that claim was known to them at the time of reorganization and they should have come forward and asserted it at that time.

Mr. Phleger: That is just what I am saying.

The Court: Of course, we are in equity here and we should not pay too much attention to the form. In other words, I think offhand this case is going to center down, not so much to the manner in which things were done, but as to whether there is in fact

and in truth and in good conscience and in equity a valid [221] claim or not. That, I think, is the toughest hurdle the plaintiff has to get over.

Mr. Phleger: You will notice, your Honor, in the statement of counsel just now of the position of the defendant, his second point was it was the duty of the plaintiff to have come forward in the reorganization proceedings and assert his claim. Now, all of this line of evidence is just going into the point that it was not in a position to do that. It was in a state of corporate coma. It was dazed by the loss of its entire investment, and it was being represented and advised by counsel who were handling the tax matter, who were employed by the reorganization trustees, and who were later paid for their services, in part by the company, and for whose ultimate benefits the matter was handled. That is our point.

The Court: Of course, we are not dealing with the technical tax question. If we strip aside the corporate fiction, the plaintiff was the Western Pacific Railroad Company.

Mr. Phleger: That is right.

The Court: They owned all the stock, so it was the company. That comes down to the question, doesn't it, in the last analysis, of whether or not the owner in reorganization can get some, let us say, after-discovered right or asset out of the reorganization?

Mr. Phleger: No.—

The Court: If we are dealing in equity. [222]

Mr. Phleger: I think we have not perhaps made our position exactly clear. Our claim is not that we are entitled to share in any assets that were in the hands of the reorganization trustees or in the company as their successors, because we were the stockholder, and arising out of that stock.

The Court: You mean because of the creditors' claim?

Mr. Phleger: No, it is because the defendant, either through its trustees in bankruptcy or itself later took and employed for its own use in connection with these tax returns the tax loss, that is, the loss of the \$75,000,000 investment in its stock, and it took—like any other property of the plaintiff, and with that it discharged its tax liability of \$20,000,000. It is just as if it took a promissory note or something else and used it to discharge its tax liability, and thereby it obtained a benefit or advantage from the use of the plaintiff's property, which in good conscience it should account for. We are not tracing this through the continued ownership of the shares of stock or as attributable to the shares of stock. We are attributing it to the fact that in the tax returns, that were filed the loss of the parent corporation was utilized to offset the subsidiary's income, with the result that the subsidiary did not have to pay a tax which it would have had to pay had it not utilized the parent's stock loss.

Now, that hasn't anything to do with the fact that there was a technical affiliation which did con-

tinue after the loss. [223] It is property. Our point is that property, namely the tax loss belonging to the plaintiff corporation, was taken and utilized by the subsidiary corporation to satisfy its tax liability.

The Court: Why could not that question, Mr. Phleger, which I have suspected all along, and I think I said so already, is the question I have to determine—why can't that question be determined without all this business of my hearing what one lawyer said to another about it?

Mr. Phleger: Because there are all sorts of defenses, including the defense which has just been asserted here, namely, that granted, for the sake of argument that we do have that claim, it was lost because this moribund plaintiff, or rather this shocked plaintiff, did not appear in the reorganization court and asserted, and we are merely pointing out——

The Court: You are anticipating a defense?

Mr. Phleger: Well, and I think it is a point of the equities also, if your Honor please. I think one of the equities of this case is the fact that counsel employed, paid for by the trustees and later by the company, took over and handled this tax matter. I think that is an affirmative equity. But if you will read my opening statement of yesterday, I stated a proposition of law, which is the basic proposition of law, and we have just been talking about it, that is the basic proposition; but I do think, and it is perfectly obvious, that the

defendant is going to come forward and say, "Why didn't these people appear? [224] Why didn't they come in and tell Judge St. Sure of this? Why didn't they demand a contract? Why didn't they do all of these things?" As counsel said, they were an object of charity and time. As Coulsen said here in his memorandum, they haven't got enough money to prepare their tax returns.

The Court: Well, do you think it is necessary to put in all these matters in the affirmative case?

Mr. Phleger: I think it is a very definite equity here bearing upon the inequity of retaining the benefits that the defendant corporation, through its attorneys and its agents, took over and handled this tax matter and utilized for their benefit, for the benefit of the people who employed them and paid them, this tax loss.

The Court: You, of course, have studied this matter and I have not. I suppose I am responsible for starting this discussion, only with the thought in mind that some of what appeared to me to be unnecessary matter, making a very large record here, might be curtailed; but if you consider it is a part of the equitable showing which you wish to make, of course, you go ahead and present whatever you consider is proper on that.

Mr. Phleger: It will show, for instance, that all of these discussions about the tax loss, that is the main discussions were held in San Francisco with the counsel for the reorganization trustees and with the officers of the company here. It will

show that all of the negotiations for the settlement of [225] the case were conducted by these counsel employed by the trustees in the company without the knowledge of the plaintiff corporation. I think that creates equities.

Now, if counsel wants to withdraw its position that because we did not do something we lost a right which we otherwise would have, I would be very glad not to put in so many of those exhibits, but I will say, your Honor, I have called down over 2000 exhibits to about 80, and the original offers that were made here, both by defendant and intervener, added up to some 1200 exhibits and I thought as a result of a lot of hard work I really had got it down to something pretty small.

The Court: Well, go ahead with the exhibits.

(Memorandum dated June 26, 1943 was thereupon received in evidence and marked Plaintiff's Exhibit 51.) [226]

* * *

Mr. Phleger: 52, yes, consisting of two sheets, as I say, identified as intervener's 31A and 31B.

(The documents referred to were thereupon received in evidence and marked Plaintiff's Exhibit 52.)

Mr. Phleger: The first sheet is a letter on the letterhead of Pierce and Greer dated May 26, 1943, signed by F. C. Nicodemus, addressed to Mr. Polk:

"Attached is form of communication to security holders which the Western Pacific Railroad Corpo-

ration would like to hand out to persons applying at its office for information as to the status of the corporation.

“Is there any reason in your mind, in connection with [227] your letter to the railroad corporation of May 20, 1943, why the corporation should not do this?”

“Yours very truly,

F. C. Nicodemus.”

At the bottom in longhand——

Mr. Adams: In Mr. Polk’s handwriting.

Mr. Phleger: In Mr. Polk’s handwriting, which I have difficulty reading, and you might help me——

Mr. Adams: It is dated May 26.

Mr. Phleger: 5/26.

* * *

Mr. Adams: (reading)

“Mr. Nicodemus phoned me before a reply could be prepared and I told him I had no objection save that the actual dissolution should be deferred until the plan consummation in any event—perhaps longer, as tax aspects warranted. J.K.P.” [228]

* * *

Mr. Phleger: No, I have already offered it.

I will offer as Plaintiff’s Exhibit 53 a memorandum also identified as intervener’s 116 dated January 8, 1944, signed by the initials J.K.P., Mr. Polk. It is, your Honor, I think, an important memorandum. It deals with the tax matters.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 53.)

“Memorandum

“In Re: Western Pacific

“Reorganization Trustees

1943 Federal Income Tax Return

“Conferences were held today with Mr. Elsey, Mr. Englebright, Mr. DeGraff, and Mr. Gloster at the Company offices, and with Mr. Elsey and Mr. Matthew at luncheon in connection with the deduction to be claimed by the parent company on loss on the operating company's stock, their affect thereof upon the tax liability of the subsidiary operating company:

“It was explained that under Internal Revenue Code provisions losses on the stocks of operating subsidiary [229] companies were specifically removed from the capital gains and loss classification and accordingly allowed as operating losses and, on consolidated return treatment the parent company loss could offset subsidiary company incomes.

“The Western Pacific Railroad Corporation's investment in the (operating) Western Pacific Railroad Company's stock has been shown at \$75,000,000. The basis is under any calculation well in excess of the operating income of the operating company for 1943.

“There has been accrued on the operating com-

pany's books through November a reserve for Federal tax liability of approximately \$7,500,000. Since there will be no tax liability if this operating loss deduction on the consolidated return basis is allowed the suggestion was made that the books of account be adjusted so as to reflect at December 31 no accrual for Federal tax liability on the part of the operating company for 1943.

"After considerable discussion it was decided tentatively to set up a "Reserve for Road Improvement" in an amount approximating the \$7,500,000 figure. This action is to be taken upon order of the court after appropriate application for same. As a preliminary step the procedure is to be further studied and submitted to the Reorganization Committee for their approval, which if [230] obtained is to be then submitted to the trustees for their approval. In support of the dollar reserve, accrual engineering studies are to be compiled showing cost of change of existing rails from 80 to 112 pounds, installation of continuous block system, substitution of concrete for timber tunnel linings, and possibly extension of centralized traffic control. Studies are also to be included of cost of acquiring modernized passenger and freight equipment. Further conferences are to be held Monday on these matters."

I think the rest of the letter is not important.

Mr. Clark: Isn't that the memorandum that requests an opinion, Mr. Phleger?

Mr. Phleger: No.

Mr. Adams: Yes, it is.

Mr. Clark: The last sentence.

Mr. Adams: There is a short balance. You might read that into the record.

Mr. Phleger:

"Mr. Gloster furnished the undersigned with a preliminary draft of engineering studies on machinery and equipment investments for consideration in connection with the Bureau requirements for submission of data under Treasury Mimeograph 58.

"Discussions were also had with Mr. Matthew and Mr. [231] Elsey concerning the program for corporate readjustments and substitute lease arrangements with the Salt Lake City Union Depot and Railroad Company. Mr. Matthew has completed a draft of lease and a copy is to be furnished me for review. In the draft Mr. Matthew has made provision for limited preferred stock dividend requirements, but in the light of the discussion of Mr. McAllister's suggestions has noted that these provisions are subject to revision to accord with the proposals prepared by Mr. Hart and the undersigned. Mr. Matthew is to join in the conference to be held Monday in regard to both the tax return and the Salt Lake Depot matters. A request was made that opinion letter of counsel be drafted covering the tax return deduction item and this will be done after review of the applicable statutory provisions Monday.

J.K.P." [232]

The Court: Is this what you referred to in your chronology as the accrual reversal, in January of 1944?

Mr. Phleger: That is the first mention of it, yes. That is the conference at which the reversal of the accruals and the setting up of a reserve was discussed.

Mr. Adams: This is Mr. Polk's memorandum.

Mr. Phleger: Correct.

Mr. Clark: This is the period of time——

The Court: This is the subject matter that you are referring to, January of 1944, is that right?

Mr. Phleger: That's right. We are coming now to the Coulson opinion letter.

I will now offer in evidence as Plaintiff's Exhibit 54 a letter known as his "opinion letter," and it is evidently the letter which is mentioned in the memorandum just placed in evidence.

Mr. Adams: Your chronology order is in reverse. The memorandum speaks of an opinion to be rendered, and you are now speaking of the opinion subsequently rendered.

Mr. Phleger: That's right.

(Letter dated January 11, 1944, from Whitman, Ransom, Coulson & Goetz referred to was received in evidence and marked Plaintiff's Exhibit 54.)

Mr. Phleger: Exhibit 54 is a letter on the Coulson letterhead, signed by "Whitman, Ransom, Coulson & Goetz." You will [233] stipulate that that

was in effect signed by Mr. Coulson in behalf of the firm?

* * *

Mr. Adams: The signature of the firm, the firm name, "Whitman, Ransom, Coulson & Goetz," is Mr. Coulson's handwriting.

Mr. Phleger: This letter, your Honor, is an important letter and is the legal opinion upon which these tax actions were taken, including the reversal of the accruals for 1943 and the setting up of the reserve just mentioned. It is addressed to Mr. Charles Elsey, President, Western Pacific Railroad Company, 526 Mission Street, San Francisco, California:

"Dear Sir:

A preliminary review has been had of the statements of income and expense of the Western Pacific Railroad Corporation, the Western Pacific Railroad Company and the several subsidiaries of the latter company. This review was made with particular regard to a consideration of the applicability of [234] Internal Revenue Code provisions to the transactions of the several system companies in order that there might be made at this time as definite as possible an estimate of Federal income and excess profits tax liability for the year 1943.

In view of the elections heretofore made and of the continuation during 1943 of the stock ownership of the subsidiaries by the Western Pacific Railroad Company and the stock of that company

by the Western Pacific Railroad Corporation the tax liability is to be determined on the basis of consolidated returns. In the determination of taxable net income on a consolidated return basis the losses of affiliated companies are offset against the gains of other affiliated companies and resulting net income of the group alone is subjected to tax.

Under the Interstate Commerce Commission plan of reorganization the capital stock of the Western Pacific Railroad Company was deemed worthless and the holder of that stock excluded from participation in the securities provided under the plan for issuance by the reorganized company. The Commission plan was from the time of its inception vigorously contested by the holder of capital stock of the railroad company and others. The plan was first [235] sustained by the United States District Court, but prior to January 1, 1943, the action of the United States District Court had been reversed by the United States Circuit Court of Appeals, so that there was sound reason for expectation that the holder of capital stock of the Western Pacific Railroad Company would participate in the securities in the reorganization. The capital stock was definitely not worthless at the beginning of the year 1943.

During 1943 the Supreme Court of the United States reversed the United States Circuit Court of Appeals and there was thus reinstated the Interstate Commerce Commission reorganization plan.

Later during the year the United States District Court, after completion of all legal requirements, entered its order of confirmation of the plan. During 1943 therefore the stock of the Western Pacific Railroad Company owned by the Western Pacific Railroad Corporation became worthless.

The stock of the railroad company was originally issued to the railroad corporation upon the transfer of the operating properties to the railroad company at the time of its organization. Both the railroad company and the railroad corporation have [236] at all times reported to the Federal Government the value of this stock of at least the par amount of \$75,000,000. A review of the company records of dealings with the Bureau of Internal Revenue does not indicate that its value has been disturbed. For the purpose of preparation of the 1943 Federal income and excess profits tax returns this valuation and basis of \$75,000,000 for the stock of the Western Pacific Railroad Company in the hands of the Western Pacific Railroad Corporation appears proper and should, except as noted below, be adopted without change.

It is apparent from the foregoing that the stock of the Western Pacific Railroad Company having a basis to the Western Pacific Railroad Corporation of \$75,000,000 became worthless during 1943. Under Sections 23(f) and (g) of the Internal Revenue Code provision is made in the determination of taxable net income for deduction of losses sustained by corporations.

It is of particular importance to note that under certain circumstances in the classification of losses there are excluded as capital losses those sustained upon the stock of affiliated corporations becoming worthless. The Western Pacific Railroad [237] Company meets the statutory requirements so that the worthlessness of its stock during 1943 does not become a capital loss to the railroad corporation but falls into the general loss deduction provisions of Section 23(f). There are attached copies of the Code provisions above referred to and of Section 29.23(g)-2 of Regulations 11 which contains the interpretation of the Commissioner of Internal Revenue of these loss provisions.

It will be noted that while the stock of the Western Pacific Railroad Company became worthless sometime during the year 1943 the affiliation status continued throughout 1943. The inclusion of the Western Pacific Railroad Company in a consolidated return for the entire year 1943 with the Western Pacific Railroad Corporation is therefore proper.

Under Internal Revenue Code provisions a loss equal to the adjusted basis of the stock is recognized. The "adjusted basis" in the Western Pacific case is the cost (which is claimed to be \$75,000,000) less any distributions of the operating company out of capital, less losses availed of by the parent company in prior year consolidated returns, etc., all of which appear from preliminary review [238] to be negligible in amount. Accord-

ingly, there will be allowed in the consolidated return a loss to the parent company of approximately the cost of the railroad company stock. This loss however computed would appear to far exceed the incomes of the other members of the affiliated group. Accordingly, for the year 1943 on a consolidated return basis there would appear to be no excess profits tax or income tax liability.

At our request there are being prepared analyses of taxable incomes and losses by each of the affiliated companies over the entire period 1917 to 1943 during which consolidated returns were filed. Similarly, information is in process of assembly from which it can be determined if any distributions by the railroad company were out of capital, etc. From these studies it will be possible to reflect in the computations of loss on the worthlessness of the subsidiary company's stock the proper adjustments for operating losses of the subsidiary availed of to offset parent or system companies' incomes in prior consolidated return periods, returns of capital, etc. Our preliminary review however indicates that any such adjustment of the [illegible] and consequent diminuation of the loss deduction in 1943 will be relatively minor and that the remaining loss will be far greater than the operating incomes of the other affiliated companies for 1943, so that the final computations will reflect net losses on the consolidated income and excess profits tax returns with the resultant showing of no tax liability for any of the system companies for 1943." Attached is a

copy of certain sections of regulations 111, and of chapter I of the Internal Revenue Code.

I will now offer as Plaintiff's Exhibit 55 a letter otherwise identified as Defendants' Exhibit 844, dated January 18, 1944, from Robert E. Coulson to Mr. Frederick H. Ecker, Chairman of the Board, Metropolitan Life Insurance Company, 1 Madison Avenue, New York, New York. Mr. Ecker was one of the reorganization committee, with Mr. Coulson.

Mr. Adams: He was chairman of the committee.

Mr. Phleger: Unless counsel wishes otherwise, I will read only one paragraph, the whole not being germane:

"Looking at The Western Pacific Railroad Company as a separate corporation, it would show an aggregate liability for Federal taxes, income and excess profits for the year 1943, of upwards of \$7,000,000. The company has, however, been joining in a consolidated return with The Western Pacific Railroad Corporation, the holding company, in [240] prior years and will necessarily so report as to 1943. Under the Internal Revenue Code, the holding company is entitled to a substantial deduction in 1943 because of the judicial declaration that the stock of the operating company, which it owned, is without value. The resulting 1943 loss will apparently exceed the operating profits of the railroad for 1943. We have advised the Bankruptcy Trustees that the tax report of the consolidated group for 1943 should take that position.

While the position so taken is technically sound, it will no doubt be questioned on Treasury Department audit. The amount of tax which the operating company would pay in reporting as a separate entity should, of course, be set aside, quite separate from the general funds of the enterprise. The management in San Francisco wish to set aside the sum and invest it in Federal bonds so that it will be available for such tax payment in the event the position taken on the consolidated return should not be successfully maintained. This seems to us a quite proper and necessary course. If you see any reason why such a funded reserve should not be set up, please let me have your comments, if possible on or before next Saturday, January 22. [241]

Sincerely yours,

ROBERT E. COULSON."

There are several similar letters which I will not offer because I think they are merely cumulative.

(Letter dated January 18, 1944, from Robert E. Coulson to Mr. Frederick H. Ecker, was received in evidence and marked Plaintiff's Exhibit 55.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 56 what is otherwise identified as Interveners' 69-A, 69-B and 69-C, two letters of Charles Elsey. The first is dated January 24, 1944, signed by Mr. Elsey, copies to Mr. T. M. Schumacher, Mr.

A. P. Matthew, Mr. Robert E. Coulson, for Reorganization Committee.

(Letters dated January 24, 1944, signed by Charles Elsey, were received in evidence and marked Plaintiff's Exhibit 56.)

Mr. Adams: If I may interrupt, this document that counsel is about to read from—there is no question about its authenticity, but it is a copy, and there is also in the record the original of the letter. I suggest that the original be used in the course of the presentation.

Mr. Phleger: Well, we will see if we can find it. May I proceed to read, and then we will substitute the original if we can find it.

Mr. Adams: That is quite all right. Go right ahead.

Mr. Phleger (Reading): [242]

“Mr. Sidney M. Ehrman:

In order to bring Mr. Schumacher up to date on the Federal tax situation, following Mr. Polk's visit and my conversation with you, the attached letter has been written.

Please note the question asked in the last paragraph of that letter and advise me whether you wish to extend approval for the creation of a contingency fund and its investment as a protection against a possible adverse outcome of discussions with the Treasury Department concerning 1943 Federal taxes.”

The attached letter, signed by Mr. Elsey, dated

January 24, 1944, and addressed to Mr. T. M. Schumacher, copies to Mr. Ehrman, Matthew and Coulson for Reorganization Committee, reads as follows:

“Mr. T. M. Schumacher:

Mr. James K. Polk of Mr. Coulson's firm was recently in San Francisco and explained to us the reasons why Western Pacific should not make any accrual for consolidated Federal income and excess profits taxes for 1943. We have received a letter from Mr. Coulson, dated January 11, copy of which is enclosed, which sets forth the reasons for such a conclusion in considerable detail.

Through November, 1943, we had accrued for Western Pacific, the amount of \$6,750,000 in anticipation of such taxes and the Western Pacific total for 1943 would have been approximately \$7,069,000. Because we now assert that there will be no Federal income tax liability on a consolidated return for 1943, it will be obvious that it would be unwise to let such an accrual stand on Western Pacific income accounts. Our books close about the 18th and after discussion with Mr. Matthew and Mr. Ehrman, arrangements were made for appropriate entries in the December accounts which entirely eliminated all Federal income and excess profits tax accruals from the income accounts of Western Pacific and other subsidiaries of the Western Pacific Railroad Corporation.

There is a possibility that our position in this matter may eventually be successfully overruled

by the Treasury Department. This raises the question of contingent liability for such taxes in that event. Consequently, we will show such a contingent liability on a supplementary statement accompanying railroad company balance sheets, as directed by Special Instruction #4 of the ICC accounting classification for balance sheet accounts, pending final settlement of the issue. [244]

In the case of Western Pacific, major contributor to any taxes paid by the corporation, the sum which would have to be paid in the event of an adverse outcome is so substantial that we believe it should be set aside in an earmarked fund—preferably in Government bonds—pending final determination of the issue. Such a fund for the Western Pacific would be approximately \$7,100,000. The amounts involved for the other subsidiaries are nominal and need not be set aside.

Please let me have your instructions with respect to the proposal to create a contingency fund and its investment in Government securities. If you approve the proposal, I will arrange with Mr. Mathew for necessary application to the Court for formal authority to carry the matter to a conclusion.

In a separate letter, copy of which is attached, I am presenting the proposal to Mr. Ehrman for his view.”

(Whereupon a conversation among counsel occurred out of the hearing of the reporter.)

Mr. Phleger: While they are looking for the

original, I will now offer in evidence the admission by defendants of certain requests, Request 12:

“The company, through the reorganization trustees, set aside in a reserve fund \$7,100,000 for the contingent tax liabilities pursuant to an order of the bankruptcy court made that day, and with the funds purchased \$7,100,000 of United States Treasury Savings Notes, Series C, which are still in the possession of the company.”

Railroad's response:

“Admit, except that the reserve fund was set aside by the reorganization trustees and not be the defendant, the Western Pacific Railroad Company.”

The Western Realty response admits that \$7,100,000 was set aside for a reserve against contingent liability by the reorganization trustees, and refers to the order for a true and correct statement of its provisions.

The request 13 has to do with the \$3,000,000 fund:

“On March 26, 1945, the company set aside as a reserve against contingent federal tax liabilities for the first four months of 1944, the further sum of \$3,000,000, and purchased therewith United States Treasury Savings notes Series 3, which are still in the possession of the company.”

Railroad's response:

“Admit, except that the reserve set aside as a reserve against contingent federal tax liability was set aside [246] by the defendant, the Western Pa-

cific Railroad Company, and not by the debtor in reorganization.”

In other words, it was set aside by the defendant, and still in its possession.

The Western Realty response admits that \$3,000,000 was set aside as a reserve against contingent federal tax liability by the defendant.

I will call your attention to the fact that both admissions are that funds are now in the possession of the defendant, the first fund of \$7,000,000 having been set aside by the trustees in reorganization and the second fund of \$3,000,000 having been set aside by the defendant company; both admitting that the funds are now in the hands of the defendant.

Mr. Adams: Yesterday counsel read into the record the statements of Western Pacific Railroad Company in respect of these funds, pointing out that in the annual reports for later years, the description of the fund has been changed from its original import, which was to serve as a reserve fund for contingent tax liability, so that it now stands as a reserve fund in respect of contingent litigation liability. The tax questions having been closed and settled. I think that that statement is a fair statement. It seems to me an attempt to recall at this moment something that counsel read into the record yesterday.

Mr. Phleger: Yes. Well, that is quite true. The chief object of our request for the admission was to show that those [247] funds are presently

in the hands, in that form, of the defendant company. [248]

* * *

I will first offer as Plaintiff's Exhibit 57 two sheets otherwise identified as Interveners' Exhibit 293, 352 and 353.

(The sheets referred to were received in evidence and marked Plaintiff's Exhibit 57.)

Mr. Phleger: It consists of certified copies of resolutions of the A. C. James Company, the board of directors of the A. C. James Company, April 28, 1943, resolving "That it is in the interest of the company that the reorganization of the Western Pacific Railroad Company be effectuated at as early a date as possible on the basis of the Commission plan."

Mr. Adams: Will you read the balance, Mr. Phleger. It is only four lines.

Mr. Phleger: "——and that counsel for the Company be instructed to so advise other interested parties and to take any further steps in his discretion to carry out the indicated objective."

The second resolution is that of the James Foundation of New Lork, Incorporated, meeting of the board of directors April 28, 1943, the substance of which is the same as the resolution just mentioned.

I will now offer as Plaintiff's Exhibit 58 the petition of the trustees in bankruptcy for authority to establish a reserve fund for contingent tax liabilities, that being the \$7,100,000 reserve that has

been frequently mentioned. I only desire to direct the Court's attention to one statement in it, and that is that the estate of the debtor contains sufficient cash derived from the earnings of the railroad, of the debtor, during the year 1943 to establish a reserve fund in the amount of \$7,100,000 without using funds required for other purposes. [250]

(The document referred to was received in evidence and marked Plaintiff's Exhibit 58.)

Mr. Phleger: I will now offer as Plaintiff's Exhibit 59 three sheets otherwise identified as Interveners' Exhibits 412-B, 443 and 442. These are reports filed with the Interstate Commerce Commission reporting the contingent assets and liabilities of the railroad company.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 59.)

Mr. Phleger: I will direct attention to the fact that in the report for the year ended December 31, 1943, of the ICC, the reserve just mentioned is reported in the following terms:

"Contingent Liabilities: The Western Pacific Railroad Company has been reporting for Federal tax purposes on consolidated return with various affiliated companies. Certain companies had substantial deficits and credit carryovers affecting the year 1943. Tax counsel has advised that on the basis of a consolidated return no Federal income or excess profits tax will be properly payable for

the year 1943. In view of the present uncertainties of the consideration of new Federal tax laws, it has been deemed advisable as a precautionary measure to set aside a funded reserve in the amount of \$7,100,000 which will be invested [251] in Government securities as an estimate of at least the amount of Federal income and excess profits tax that the Western Pacific Railroad Company would have to pay if it were reporting on an individual basis rather than as a part of a consolidated group of corporations.”

Mr. Adams: The figure, Mr. Phleger?

Mr. Phleger: The figure is \$7,069,052. This is from page 228-B of the annual report form of the Interstate Commerce Commission for the year ended December 31, 1943.

Mr. Adams: I think it is page 228.

Mr. Phleger: The second sheet is the similar report for the year ended December 31, 1944, and shows a reserve on contingent liabilities for the same amount. The third sheet is a similar report for the year ended December 31, 1945, showing the item for contingent liabilities in the same amount, but with the additional statement of contingent assets:

“The Western Pacific Railroad Company paid an amount of \$4,144,828.87 as its proportion of the Federal income tax for the year 1942 on the basis of the consolidated return of the various other affiliated companies. Claim for refund of the entire amount paid under consolidated return amount,

\$4,201,821.54, was filed by the Western Pacific Railroad Corporation on March 9, 1945." [252]

The figure opposite that being \$4,144,829.

I will next offer as Plaintiff's Exhibit 60, otherwise identified as Interveners' Exhibit 454, a letter on the letterhead of the Coulson firm under date of March 5, 1944, signed by Robert E. Coulson, addressed to Mr. Charles Elsey, President, The Western Pacific Railroad Company.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 60.)

Mr. Phleger: I will direct the Court's attention to the last paragraph. This has to do with the advisability of certain amendments to the California State Corporation Law so as to permit the continued use of the corporate charter of the debtor in bankruptcy.

"Needless to say, I hope you will be able to give the matter attention promptly, as it will be a great safeguard to have the statute on the books in California in the event we are not able to secure a contractual transfer to the reorganization committee of the stock of the operating company. The advantage of using the old operating company corporate shell for the purposes of reorganization are so substantial that I would be entirely willing to see the reorganization delayed, if necessary, for as much as three months rather than to be forced to effectuate the reorganization through [253] the organization of a new company."

I will now offer in evidence as Plaintiff's Exhibit 61, also identified as Interveners' 202, a letter on the letterhead of the Coulson firm under date of October 16, 1944, signed by Robert E. Coulson, addressed to Mr. Elsey.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 61.)

Mr. Phleger: This also deals with certain matters arising out of the use of the charter of the defendant, the debtor in reorganization, and having to do with certain tax incidents and the setting up of its books. This is the last two paragraphs on page 2.

Mr. Adams: On what page? There are several pages in this letter.

Mr. Phleger: Page 2.

"You no doubt have clearly in mind one basic factor involved in this entire problem. Section 77 in the melding of related reorganizations under the Bankruptcy Act, technically gives legal title to the property of the debtor to the bankruptcy trustees. The Treasury Department might have used this technical aspect to justify them in taking the position that the bankruptcy trustees were a new taxable entity, which ought to report earnings of the properties and make no deductions for interest paid or accrued on the outstanding obligations of the debtor, but only on obligations actually incurred by the trustees (trustees' certificates) or on obligations definitely assumed by the bankruptcy

trustees. The Treasury Department, after a good deal of internal discussion in general counsel's office has reaffirmed a policy which regards the debtor as a continuing entity. This has permitted the debtor to deduct accrued interest on the old obligations which were outstanding up to the date of consummation. I need not tell you that this is enormously important from a dollars and cents point of view during the recent excess profits tax years."

I will now offer as Plaintiff's Exhibit 62 a telegram otherwise identified as Defendants' Exhibit 933. It is a telegram dated December 20, 1944, signed Robert E. Coulson, addressed to Charles Elsey, President, The Western Pacific Railroad Company, San Francisco.

(The telegram referred to was received in evidence and marked Plaintiff's Exhibit 62.)

Mr. Phleger (reading):

"Mr. Polk and I have been discussing treatment of Federal tax matters for the calendar year 1944.

It seems clear that the only course open is to proceed as indicated in conversations with you, including report on a consolidated basis up to May 1, with a later determination as to consolidated or separate basis for the balance of the year during which holding company no longer held operating company's stock. Mr. Polk has arranged to defer any readjustments on books of account as suggested by Interstate Commerce Commission Bureau of Accounts until after a conference with

Bureau of Accounts on January 17 and has so advised Mr. DeGraff.” [256]

* * *

I will now offer as Plaintiff’s Exhibit 63 a document otherwise identified as Interveners’ 223-C, consisting of a memorandum dated January 23, 1945, signed by J. K. Polk, that being Mr. Polk, addressed “Memorandum for Colonel Coulson.” The journal entries refer to completion of reorganization.

(The document referred to was received in evidence and marked Plaintiff’s Exhibit 63.)

* * *

Mr. Phleger: The paragraph I would like to direct the Court’s attention to is as follows:

“It was clearly understood and agreed that under no circumstances”——

Mr. Adams: What page, please?

Mr. Phleger: This is page 1, last paragraph.

(Continuing reading): “——would the corporation jeopardize its primary tax advantage deliberately secured through the maintenance of the continuity of the 1916 corporation by voluntarily filing any proposed journal entries of the type suggested in the letter of December 6, 1944. Subject to such amendments, additions and corrections of dollar figures as will develop from the use of the December 31, 1944, closing figures, it is the position of counsel and of Colonel Coulson as a member of the Board, that the entries reflected in principle in the memorandum of January 17th conference

should form the basis of the proposed journal entries to be prepared and submitted for Interstate Commerce Commission consideration.

“There is attached a photostatic copy of a work sheet reflecting the type of balance sheet before and after journal entries of the kind indicated in [258] the January 17th memorandum. It was noted, of course, that the position estimated as of December 31 will probably vary materially in the cash and current asset qualifications from the actual figures which will form the starting point for the proposed journal entries and schedules to be submitted to the Interstate Commerce Commission. It will also be noted that the resulting balance sheet will reflect an unearned surplus of approximately \$83,000,000 and that of this sum only the amount of \$75,800,000 is to be classified as ‘paid in surplus’ for Federal income tax purposes, the balance constituting ‘accumulated earnings and profits’ in any invested capital or source of dividend distribution computation.”

Mr. Adams: The document consisting of five pages and being a memorandum of Mr. Polk.

Mr. Phleger: I will now offer as Plaintiff’s Exhibit——

Mr. Adams: May I ask, if I may interrupt? You read a portion which contained a reference to work sheets. You have offered, however, simply the document of five pages, I take it?

Mr. Phleger: That is correct.

I will now offer as Plaintiff’s Exhibit 64 a let-

ter otherwise identified as Interveners' No. 68, which has been referred [259] to variously as the "first Krigbaum letter." It is a letter——

Mr. Adams: Now, just one minute. I don't understand that reference, and it is the first time I have heard it.

Mr. Phleger: Well, I am going to call it that. It is the first letter written in connection with the tax matters by the Coulson firm to C. R. Krigbaum, Internal Revenue agent in charge, 225 Broadway, New York. There was a later letter written to Mr. Krigbaum, which I will later refer to as the "second Krigbaum letter." This letter is dated May 31, 1946, is signed by "Whitman, Ransom, Coulson & Goetz," addressed to Mr. C. R. Krigbaum, Internal Revenue Agent in Charge, 225 Broadway, New York.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 64.)

* * *

Mr. Phleger: The next document I offer in evidence as [265] Plaintiff's Exhibit 65, otherwise identified as Interveners' 103. It is a power of attorney from the Western Pacific Railroad Corporation, under date of June 26, 1946.

(The document referred to was received in evidence and marked Plaintiff's Exhibit 65.)

Mr. Phleger: This is after the Krigbaum letter.
The Court: The next month?

Mr. Clark: About a month later. [266]

* * *

Mr. Phleger: My statement was not intended as evidence.

I will now offer as Plaintiff's Exhibit 66 a document otherwise identified as Interveners' No. 205.

* * *

Mr. Phleger: I use the universal "we." The supplemental complaint was filed, your Honor, on December 17, 1947, long after all of these events that we are talking about now. And the subject matter of it in part were the events, as is appropriate with the supplemental complaint, that took place after the filing of the original complaint. So with respect to the manner and method of settlement, what was done, how it was handled, in what manner, those are all germane and are matters of evidence in this suit, because they all took place before the filing of the supplemental complaint which set them forth as the basis of the supplemental complaint.

The original complaint, may it please your Honor, was before the final decision that the defendant would actually receive any benefit as a result of the tax returns. As the evidence will show, it was not deemed that the benefit or advantage had actually been received by the defendant until the tax settlement was made, which was in August of 1947. And so it seems to me that there should be no question——

The Court: Yes, but Mr. Phleger, you are not complaining about the tax settlement.

Mr. Clark: No, no, indeed.

Mr. Phleger: No, no.

The Court: Therefore any statement that you would want to put in as to what an attorney said with respect to that matter might be no more than what attorneys say or do in the course of litigation.

Mr. Clark: That is not the point.

Mr. Phleger: That is not the point, your Honor, but what the attorney here characterizes the president of the corporation as, and his duality, and so forth, I take it is evidence, whether it happened before or after the filing of this suit. Now, this telegram is introduced——

The Court: Well, what does the telegram say, and maybe I can rule upon it? [274]

* * *

Mr. Phleger: This is a wire from Mr. Coulson to Mr. Matthew, dated December 7, 1946:

“We have an embarrassing situation in connection with examinations before trial in pending stockholders’ suits because of various capacities in which Curry has acted. He is president of the holding company. As such he holds certain files and papers of the holding company. We have pointed out necessity of distinction between these files and files of correspondence written or received by [275] him or Schumacher as former officers of the operating company. These files belong to operating company and should be technically in our custody as tax counsel insofar as they involve the tax matters. Curry raises question under your letter May 8, 1945, to bankruptcy trustees. Schu-

macher asked Curry to act as his representative in retaining custody of trustees' books and records. This has been construed to include all correspondence with officers of operating company during reorganization period. In our judgment records directly affecting operating company must necessarily be turned over to operating company by bankruptcy trustees even though they remain available to bankruptcy trustees. Can you clear this situation by wire to us or directly to Mr. Curry?

COULSON."

Now, we are offering that as being a declaration or statement by Coulson as to the duality in capacity being occupied by Mr. Curry and what resulted from them, in this particular respect.

Mr. MacKinnon: How is that binding, your Honor, on the defendant?

The Court: It doesn't make any difference, Mr. Phleger, about what Mr. Coulson says about it, does it? [276]

Mr. Phleger: Except that Mr. Coulson was the attorney for the defendant corporation in these matters.

The Court: Well, whether he says the man is acting in a dual capacity or not isn't of any importance. The facts will show that.

Mr. Phleger: May I suggest to your Honor that the state of Mr. Coulson's mind as to his knowledge as to whether or not this man, who was the president of the holding corporation and also the vice president and other officers of the operating

company, was in a dual capacity—the state of Mr. Coulson's mind is a fact which we are entitled to prove.

Mr. Clark: Plus the fact that Mr. Coulson is now a director of this defendant.

Mr. Phleger: What Mr. Coulson thought Mr. Curry's capacities were—he was acting for him, he had the power of attorney of the corporation, signed by Mr. Curry. I think his state of mind, his knowledge of the fact that Mr. Curry was on two sides, is important.

The Court: Well, you have already established, according to the record, the various capacities of Mr. Curry, haven't you?

Mr. Phleger: I have tried to establish that Mr. Coulson knew it.

Mr. Clark: This establishes the consciousness, your Honor. [277]

Mr. Phleger: And that Mr. Matthew was informed of Mr. Coulson's knowledge.

The Court: Well, how could he help knowing it?

Mr. Phleger: I don't know how he could help knowing it, but——

The Court: I don't see any particular importance to this telegram. I also don't see any harm in having it in evidence. But if Mr. Curry, as the record shows, was occupying these various positions, well, the fact that Mr. Coulson says he was, if in fact he was, doesn't add anything to it. You say it is important that this knowledge be shown. But does it need that telegram to show that?

Mr. Phleger: I think it is one way of showing it. He was dealing with this man, and I thought it important to show that he knew in his own mind that he was acting in a dual capacity.

Mr. Levy: Your Honor, with Mr. Clark's permission—he has permitted me to say a few words—I think the relevancy of this exhibit has been talked around, but not talked at, and I think that it has one very strong basis for admission. If your Honor is mindful of one of the theories that we have presented in this case and that we still present in this case; namely this, that apart from the theory of duality and apart from the theory of unjust enrichment, we believe and we believe the evidence justifies our presentation of this theory, and in fact requires it, that there was a conscious use of this corporation for the benefit of the railroad company, and that that letter led to a legal theory other and apart from any that we have discussed, and that it will perhaps lead to a different result as to the quantum of recovery.

Now, in an effort to prove a conscious use of another corporation, you have to prove acts. You want to prove motive, and you want to prove position. And I don't think that in order to prove any of those things during a particular period you are restricted to the event of that period, to the extent that anything may occur later that has a reflection backwards. It is just pertinent and just as proper as evidence of what was the then con-

duct during the period with which we are concerned. Now, let's document that for a moment.

During the period of the tax transaction, that is, the signing of the 1943 return, the filing of the refund claim for 1942, the signing of the 1944 return—and that brings us on this chart to June 15, 1945—during that period, we say, Mr. Coulson's firm had, and Mr. Coulson personally had, this conscious purpose which he exerted and effectuated through the use of some of the corporation's own officers. Now, this exhibit brings us to December, 1946, admittedly one year and a half later.

Now, let us see what has occurred between June 15, 1945, and December, 1946. Where is Mr. Curry, the president of this corporation? He is in Mr. Coulson's office. That is where he is employed. And what is his employment? Not as an attorney of Mr. Coulson's office; Mr. Curry is not an attorney. His employment in Mr. Coulson's office, as the document read to you specifically stated, was as the president of this corporation to do things for the defendant railroad company in connection with the effectuation of these very savings which we are now litigating the right of either of these parties to.

The Court: I do not think you need to labor that point. I have not heard in anything the other side has said any statement that denies the effect of this arrangement was to benefit the defendant corporation. The question in this case is: Was there a right to do it?

Mr. MacKinnon: That is the question. You are precisely [280] correct.

The Court: What difference does it make whether this attorney sent the letter? Of course, he knew that these steps were being taken to file these returns for the benefit of the railroad company. The only question is: Was there a right to do it?

Mr. MacKinnon: That is the question. Your Honor hits the nail right on the head. That is the only question in the case.

Mr. Levy: If I may disagree with you, I do not think your Honor hits the only question in the case. I think your Honor hits one of the questions in this case.

The Court: I think perhaps we are spending unnecessary time. I do not think this telegram is harmful in any way. It is merely a telegram by an attorney with respect to facts of which there is already some evidence.

Mr. Levy: It is not the statement of an attorney; it is a statement of Mr. Coulson, director of this railroad company.

The Court: You do not have to prove the kind of intent here that you have to prove in a criminal case. You do not have to show the facts that are already demonstrated, with which this man was dealing, and then in addition show that there was some conscious mental activity on his part evidenced by something that he said or did by which he recognized that that was the fact. The facts themselves demonstrate that. I do not think [281] it is of any importance. I think we are spending too much time about it.

Mr. MacKinnon: I do not think it is important except it is a clear demonstration of how far afield we are getting from the issue in the case, as, of course, as I said at the outset, they make the issues and we will have to meet them.

Mr. Adams: May I say one word, because I started this discussion. I only arose with the thought in mind that perhaps you could get some limit as to the things we will have to explore, because they are thrown forward by our adversaries, and it occurred to me perhaps a sensible limit would be to say that once this plaintiff corporation, through interveners and through its own counsel, voiced this claim and had its lawsuit and were actively looking after it, that that might be a time when we should stop the examination into what was done. Up to that time these gentlemen, I understand, had the contention here that something was taken from the corporation without its knowledge, while, as Mr. Phleger says, it was in a coma. Certainly at the time they filed the lawsuit and made the claim the knowledge was there and the coma was ended and it occurred to me that perhaps that might be a reasonable way of putting some limit on what should be brought before your Honor. But it is only a suggestion I arose to make in that connection.

Mr. Phleger: Perhaps I should correct counsel's characterization of plaintiff's case. We take the position, your Honor, [282] not only that there arose a right in us when our property was taken and the

handling of the income tax matter was taken over by the defendant corporation, but we say that when all of those acts took place the plaintiff corporation, by virtue of the fact that all its active officers were acting in dual capacities should not be charged for lack of action, with making of gifts, or any of these other matters which defendants are raising as defenses, and they bear also directly upon the equities. We want to prove, beyond peradventure, that this defendant took over and handled these tax matters and dealt with plaintiff's property, as a result of which it was unjustly enriched, and the fact that the active officers and the people who were purporting to represent the plaintiff corporation were at this time in the employ and in the pay of the defendant corporation is a very important part of this case, and this wire shows that the chief actor on the part of the defendant knew that fact.

The Court: I think the evidence otherwise may show that.

Mr. Phleger: I agree this is accumulative.

The Court: I do not think that this is too important, this document. I will allow it to be admitted in evidence subject to a motion to strike if at some future time in the case the importance of it may assume greater proportions.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 66.) [283]

Mr. MacKinnon: I do not think, your Honor, it will ever assume importance. The only point I want

to emphasize is that they are embarking on an unlimited field and we will have to meet it. That is all. We will have to put in the full facts. They say they are dealing in equities. They have selected documents and we will have to meet them. We have no alternative.

The Court: We can't help that. I think perhaps we will take a brief recess at this time.

(Recess.)

Mr. Phleger: Mr. Curry, will you take the stand, please?

MICHAEL J. CURRY

called as a witness on behalf of the plaintiff, sworn.

The Clerk: Will you state your name to the Court?

A. Michael J. Curry, 10 Perth Ave., New Rochelle, New York.

Direct Examination

By Mr. Phleger:

Q. Mr. Curry, what is your occupation?

A. I am a retired railroad official.

Q. Did you know Mr. Schumacher in his lifetime?

A. During his lifetime, yes. I have known him since 1914.

Q. Will you very briefly state to the Court how you met him? And generally your relations with him during his lifetime?

A. I met him in 1914. At that time I was with

(Testimony of Michael J. Curry.)

the Chicago, Rock Island and Pacific Railway, in Chicago, Illinois, and Mr. J. E. Gorman, was president of the Rock Island at that time. [284] He was the brother-in-law of Mr. Schumacher. He had stated to Mr. Gorman that he was looking for a secretary to come to New York, and Mr. Gorman suggested that I might be willing to come with him. So he conferred with me, and I agreed to come as Mr. Schumacher's secretary.

At that time he, Mr. Schumacher, was Chairman of the Board of the Rock Island and Vice President of the El Paso and Southwestern Railroads. I remained with Mr. Schumacher from that time up to his death in February, 1948, in various capacities as secretary and assistant to the president of the El Paso and Southwestern, and as his chief clerk when he became executive vice-president of the Southern Pacific, at the time of the sale of the El Paso and Southwestern to the Southern Pacific. At that time Mr. Schumacher and I went over to the Southern Pacific.

After about four or five months Mr. Schumacher was directed to go to Chicago and organize a traffic agency, a so-called off-line traffic agency. That was an agency in charge of all the traffic soliciting agencies that were not located on the line of the Southern Pacific.

I stayed with Mr. Schumacher in Chicago while he left Chicago in July, 1926, and I remained in Chicago as office manager of the traffic agency.

(Testimony of Michael J. Curry.)

About a year later he contacted me again and asked me if I would care to come back to New York as officer of the railroad company and corporation.

Q. That is the Western Pacific Railroad?

A. The Western Pacific Railroad Company and Western Pacific Railroad Corporation, which I agreed to do, and I came to New York and took those positions on April 1, 1927.

Q. From that date forward up until the last year or so you have been continuously connected with those companies?

A. Yes, I have been.

Q. And connected with Mr. Schumacher until his death?

A. Yes, sir.

Q. When did Mr. Schumacher die?

A. He died February 26, 1948.

Q. Can you state generally what the nature of your services were while you were serving with Mr. Schumacher?

Mr. MacKinnon: That, your Honor, I object to on the ground the by-laws of the corporation are the best evidence of the duties of the officers.

The Court: I think he wants to know what offices he held.

Mr. MacKinnon: That is all in evidence here. It is prepared in the schedule.

Mr. Phleger: Your Honor, I want to establish the general nature of the functions of this witness in order that your Honor may have some general idea of his capacity and of the manner in which he conducted the various positions which he held.

(Testimony of Michael J. Curry.)

Mr. MacKinnon: My response is to that, your Honor, the by-laws provide what the duties of the officers are. [286]

Mr. Phleger: Do they provide what the duties are of a stenographer to Mr. Schumacher?

Mr. MacKinnon: They provide what the duties are, your Honor, when he came back to the company-corporation.

The Court: I will overrule the objection, unless this is something lately.

Mr. Phleger: No, this is preliminary.

The Witness: The question, please?

The Court: What was the general nature of your work with Mr. Schumacher with both companies?

A. Generally my duties were those of a chief clerk or an office manager. Mr. Schumacher gave me to understand on many occasions that he was the boss of that office, both the company and the corporation.

Mr. MacKinnon: That, I submit, your Honor, is not responsive. I move to strike it out.

The Court: Yes, what Mr. Schumacher gave him to understand may go out.

The Witness: Well, as to the duties, they were generally those of a chief clerk or an office manager. I had a number of titles but no authority.

Mr. MacKinnon: That, your Honor, I object to on the ground that the by-laws of the corporation specify the authority. No matter what anybody

(Testimony of Michael J. Curry.)

said to him, the by-laws provide what the duties of the officers are. [287]

The Court: Yes, but the witness can testify to what he did.

Mr. McKinnon: Yes, but the protestations of the witness——

The Court: Yes, his statement that he had no authority may go out.

The Witness: May I say here——

The Court: Wait just a minute, Mr. Curry. What is it that you want to bring out? The actual functions performed by the witness.

Mr. Phleger: Yes, and I will proceed to do that, your Honor.

The Court: I think you had better ask the question.

Q. (By Mr. Phleger): When did you first become an officer of the Western Pacific Railroad Company? A. In April, 1927.

Q. And what position did you assume at that time?

A. I was appointed vice-president, assistant secretary and assistant treasurer.

Q. And at whose suggestion?

A. At Mr. Schumacher's suggestion.

Q. When did you first become an officer of the Western Pacific Railroad Corporation?

A. On or about that time I was appointed secretary and treasurer of the corporation.

Q. At whose instance?

(Testimony of Michael J. Curry.)

A. At Mr. Schumacher's recommendation. [288]

Q. Will you describe generally what you did as an officer of the Western Pacific Railroad Company?

A. Well, I performed the duties of secretary and treasurer as prescribed under the by-laws.

Q. My question is, of the Western Pacific Railroad Company?

A. Oh, the company. Vice-president, assistant secretary and assistant treasurer. I was merely a signing officer with that title. I had no authority. The by-laws of the railroad company provided that one or more vice-presidents could be appointed or elected and their duties delegated from time to time and authorized at various times to execute papers and documents of various kinds.

Q. Did you execute papers in behalf of defendant company? A. I did.

Q. Many papers? A. I would say yes.

Q. What was the general course of procedure in connection with your execution of papers for the defendant company?

Mr. Adams: Objection, your Honor, on the score of characterization. So that it may be clear, and I won't make the objection again, are these questions addressed to the time that Mr. Phleger refers to as the time when the defendant was the debtor in reorganization or prior to that time?

Mr. Phleger: It covers the entire period during which he held those titles with the company. [289]

Mr. Clark: Commencing in 1927.

(Testimony of Michael J. Curry.)

Mr. Adams: As long as we are clear about the fact that is being addressed to the witness and you are not making any particular reference as to the first four months of the year 1945. Is that clear? You are asking the witness generally over the whole period?

Mr. Phleger: That is correct.

Mr. Adams: Very well.

The Witness: The question?

(Question read by the reporter.)

A. I was instructed by either Mr. Elsey, the president, or Mr. Schumacher, the chairman, to execute such documents under the authority of the Board of Directors and under their direction.

The Court: What you mean is you signed whatever documents they told you to sign?

A. Yes, sir. Yes, your Honor.

Q. (By Mr. Phleger): Did you prepare the documents you signed?

A. I did not. I do not think that I would have ever been allowed to sign any documents that I prepared.

Mr. MacKinnon: I move to strike out everything after "I did not".

The Court: Yes. [290]

* * *

Q. (By Mr. Phleger): This question will be of particular interest to counsel. When did you become an officer of the Western Realty Company?

(Testimony of Michael J. Curry.)

A. I think some time in 1927 or 1928.

Q. What position did you hold?

A. Assistant Treasurer.

Q. At whose instance were you appointed to that position? A. Mr. Schumacher's.

Mr. Clark: Mr. Phleger, may I suggest that you put in the schedule which was identified on the deposition of the Western Realty officers and their tenures?

Mr. Phleger: I have no objection.

Mr. Clark: It is agreed to and it establishes the length of time Mr. Curry was an officer.

Mr. Phleger: That is intervenor's exhibit 200 and would be plaintiff's exhibit 67. It is a schedule of the officers of the Western Realty Company.

(Schedule of officers of Western Realty Company was thereupon received in evidence and marked Plaintiff's Exhibit 67.)

Q. (By Mr. Phleger): Where were the officers of the Western Pacific Railroad Corporation and Company in New York?

A. They were at 37 Wall Street.

Q. Were the same offices occupied by both companies? [291] A. Yes, sir.

Q. Were there employees in those offices of both companies? A. Yes, sir.

Q. Were the people who worked in those offices employees of both companies?

A. They were.

Q. How were the expenses of that office paid?

(Testimony of Michael J. Curry.)

Mr. Adams: At what period of time, Mr. Phleger?

Mr. Phleger: During the entire period.

The Witness: For some time after I came there they were divided fifty-fifty between the two companies and later on, the percentages varied.

Q. Can you fix the date up to which they were paid one-half by each?

A. I think it was up to the year 1934.

Q. And thereafter and up to June 1, 1943, how were the expenses divided? [292]

* * *

A. As I stated, the percentages after 1934 varied. They were 75 and 25 and 66 and $\frac{2}{3}$ and 33 and $\frac{1}{3}$ until June 1, 1943, when the railroad company took over the entire expense of the New York office.

Q. (By Mr. Phleger): How long was the entire, or for what period was the entire expense of the New York office borne by the railroad company?

A. From June 1, 1943, to May 1, 1945.

Q. And what happened then?

A. The office was closed.

Q. When did you become president of the Western Pacific Railroad Corporation?

A. On February 1, 1942.

Q. At whose instance?

A. Mr. Schumacher's.

Q. Was anything said to you at that time as to the reason for Mr. Schumacher's retirement and your election? [293]

(Testimony of Michael J. Curry.)

A. Yes, Mr. Schumacher was impaired somewhat physically and besides we wanted to reduce the expenses of the corporation.

Mr. MacKinnon: If your Honor please, I submit he should respond and say what was said and who said it, and not enter into a dissertation each time he is asked a question.

The Witness: Well, Mr. Schumacher said to me at this time that he would resign and he felt that I should take over the presidency and see the corporation through its liquidation and dissolution. That is what he told me at the time.

Q. (By Mr. Phleger): Did he say anything about expense?

A. Yes. His resignation—his salary went with it. He gave up his salary of \$15,000 a year.

Q. And what did they do with your salary?

A. Well, as I recall it, I was getting \$4,500 a year as secretary and treasurer, and I think for a short time after that I got \$1,000 additional, I believe it was, to act as president and treasurer.

Q. How long did your salary as the chief executive of the corporation continue?

A. I received no compensation from the corporation since June 1, 1943.

Q. That is the date on which you say all of the office expenses of the New York office were taken over by the defendant company?

A. Correct.

Q. Your salary stopped then from the corpora-

(Testimony of Michael J. Curry.)

tion, and have you [294] received any compensation from it since? A. I have not.

Q. As to your duties as president of the corporation, who prepared the minutes of the corporate meetings after you became president?

A. Well, I prepared the agenda and the minutes.

Mr. MacKinnon: That I object to because——

The Witness: I did.

Q. (By Mr. Phleger): You attended the directors' meetings, did you? A. I did.

Q. Did you engage in any discussions of policy matters personally in the directors' meetings?

A. I did not.

Mr. MacKinnon: I object to that as calling for a conclusion. The form of the question is completely bad: Did he engage in policy discussions?

Mr. Phleger: I do not see that that is objectionable, your Honor. It does not call for any conclusions.

The Court: What is bothering you about that? What "policy" means?

Mr. MacKinnon: That is right.

Mr. Phleger: It will take a lot longer to ask the questions.

The Court: What are you trying to show, that the president was just a presiding officer and a sort of figurehead? [295]

Mr. Phleger: That is correct.

The Court: Do you admit that that is so?

(Testimony of Michael J. Curry.)

A. I admit that that is so.

The Court: Ask him another question.

Q. (By Mr. Phleger): Who were the joint employees at the New York office during the period of 1943 through the date when it closed? Was Mr. Schumacher there?

A. Mr. Schumacher was there, but he was a trustee and paid, I believe, by the trustee.

Q. There was yourself—— A. Myself.

Q. Miss Valouch—who is she?

A. Miss Valouch was Mr. Schumacher's secretary, personal secretary, and in addition handled our tax matters for us and did some of my secretarial work.

Q. Who is Sheehan?

A. Mrs. Sheehan was the telephone operator, receptionist, and of the files, and assisted the other clerks generally in their work; also helping out in the transfer work that Mr. Wienken was handling.

Q. The chart shows that she was a director of the corporation. Do you know at whose instance she became a director?

A. At Mr. Schumacher's recommendation.

Q. And there was also that Miss Valouch became a director of the corporation. Do you know at whose instance she became a director?

A. At Mr. Schumacher's instance. [296]

Q. Mr. Wienken—who is he?

A. Mr. Wienken for a time was my secretary and later became secretary of the corporation and con-

(Testimony of Michael J. Curry.)

tinued to handle my secretarial work, such as typing letters and telegrams and memoranda, and took over the transfer work from the Chase National Bank, who was the transfer agent for the stock of the corporation.

Q. I notice that he became secretary and director of the corporation, secretary in 1945 and director in 1946; do you know at whose instance?

A. Mr. Schumacher's.

Q. This chart described Mr. Weinken as a stenographer. There was some question as to that designation. Was he a stenographer?

A. He was a stenographer.

Q. Pierce and Greer were the attorneys, were they, in New York for the company and for the corporation?

A. They were.

Q. Mr. Osborn—he was a director of the corporation, was he?

A. Yes, sir.

Q. And also of the company?

A. Yes, sir.

Q. Who was Mr. Hatton?

A. Mr. Hatton was assistant secretary and assistant treasurer of the Denver & Rio Grande Western Railroad. We gave him office space in our suite at 37 Wall Street, desk room only. He was the transfer agent for the preferred stock of the Denver & Rio [297] Grande. He was not connected at all with the railroad—the Western Pacific Railroad Company or the Western Pacific Corporation.

Q. I notice that he became a director or was a director of plaintiff corporation. Do you know at whose instance he became a director?

(Testimony of Michael J. Curry.)

A. Mr. Schumacher's. [297-A]

* * *

Mr. Adams: Your Honor, at this time I desire to report with reference to the request made yesterday by counsel for the production of any letter accompanying Plaintiff's Exhibit No. 42, the latest of the lawyers' bills. That request was made to me during the session yesterday. In compliance with that request I have produced and have exhibited to counsel and will hand to him a letter from Mr. Polk to Mr. Elsey, of November 15, 1948. And since the letter last mentioned refers to the letter of December 19, 1947, I have also exhibited to counsel and am now handing to counsel the letter of December 19, 1947. And at this time, your Honor, I take it that the objections stated yesterday with reference to the bills may be deemed to apply to the production of the papers just mentioned.

The Court: Very well.

Mr. MacKinnon: May the record also contain a notation to the same effect on the behalf of defendant Western Realty Company?

The Court: Very well. [298]

* * *

Mr. Phleger: I think, may it please the Court, that it would be desirable to attach these two letters to Plaintiff's Exhibit No. 42 now in evidence, and because of the importance of the letters, I will im-

(Testimony of Michael J. Curry.)

pose upon your time sufficient to read all or portions of them. The first——

Mr. Adams: It may be understood, your Honor, that an objection has been registered on our part to the offer of these documents, as not relevant or material to any issue in the case.

The Court: Very well. [301]

* * *

(Letter of December 19, 1947, Polk to Elsey, and letter of November 15, 1948, Polk to Elsey, were incorporated in Plaintiff's Exhibit 42.)

MICHAEL J. CURRY

resumed.

Direct Examination

(Continued)

By Mr. Phleger:

Q. As to the employees in the office at 37 Wall Street, who instructed them as to their duties?

A. I did.

Q. I think you have testified as to who did that. Now, after the Western Pacific Railroad Company took over the entire payroll, was there any physical change in the manner of conducting the office?

Mr. MacKinnon: I object to the form of the question on the ground that it mischaracterizes the

(Testimony of Michael J. Curry.)

evidence. There is no [306] evidence that the Western Pacific Railroad took over the entire office. It was the trustees. There is no foundation for the question. The reorganization trustees were operating the property at June, 1943, when the office was taken over. It was their function and their function alone, and there are exhibits which demonstrate that fact.

The Court: I think the Court can take note of that. I do not think the question is worded with the idea of proving that fact, but merely for the purpose of making a differentiation between two organizations.

* * *

Q. (By Mr. Phleger): Will you answer the question? A. There was no change.

Q. No physical change? Was there any change in duties that were performed by the persons who worked there? A. None whatever.

Q. It went on just as before?

A. Just as before, yes, sir.

Q. When was the office at 37 Wall Street closed?

A. April 30, 1945.

Q. Who directed the closing?

A. The president of the railroad company, Mr. Elsey.

(Testimony of Michael J. Curry.)

Q. Where did you go after the office was closed?

A. Well, I remained at 37 Wall Street to clean up some various [307] matters, and on June 1 I went over to the suite of Whitman, Ransom, Coulson & Goetz at 40 Wall Street.

Q. That was across the street?

A. Across the street, yes, sir.

Q. Who gave you the instructions to go to the Coulson office?

A. Mr. Coulson talked with me and said that I was to come over there June 1 or as soon as convenient, and that he would provide a room for me.

Q. Do you remember receiving a letter from Mr. Coulson stating that you would be retained as an independent contractor?

A. I do.

Q. I show you Plaintiff's Exhibit 33, a letter from Robert E. Coulson to yourself, June 6, 1945. That letter was received by you, was it?

A. Yes, sir.

Q. Was that the first indication you had of the amount of the retainer that was to be paid to you?

Mr. MacKinnon: Just a minute, your Honor. I object to the form of the question. I think the question is clearly bad.

The Court: I will overrule the objection.

A. Yes, the first information I had definitely of the amount.

Q. (By Mr. Phleger): Had you had any previous discussion about going over to the Coulson office?

A. It is my recollection that Colonel Coulson

(Testimony of Michael J. Curry.)

asked me to come over to his office a few days prior to the writing of that letter, [308] and he informed me of this arrangement. But at that time I do not recall that he stated any figure.

Q. Now, after the office closed what became of the other employees? Let me first mention Miss Valouch. What happened to her?

A. Miss Valouch went over to the firm of Whitman, Ransom, Coulson & Goetz on May 1, 1945.

Q. Is she still there?

A. She is still there, to the best of my knowledge.

Q. How about Mrs. Sheehan?

A. Mrs. Catherine Sheehan, yes. She elected to take her severance pay and seek a job somewhere else.

Mr. Clark: May we have a stipulation on the amount of the severance pay at this time, your Honor?

The Court: Is it important?

Mr. Adams: The fact is of record now.

Mr. Clark: I do not think it is.

Mr. Adams: You asked us for the amount and we gave it to you.

Mr. Clark: It has not been put in.

Mr. Adams: I think it has.

Mr. Clark: Will you concede that those employees who did not continue with the company, or in Mr. Curry's case, who did not get a pension from the company, received six months' severance pay from the railroad company? [309]

(Testimony of Michael J. Curry.)

Mr. Adams: Mr. Clark, whatever the fact is. I think you are right. I am a little uncertain about the precision of your statement. I am sure, however, that we furnished you all that information. You have it readily at hand and we have no objection to it being put in evidence.

Q. (By Mr. Phleger): What happened to Mr. Wienken?

A. Mr. Wienken stayed with me until I moved over to the Whitman firm, and then he left the employment of the companies, and I believe moved to Texas or someplace.

Q. And how about Mr. Hatton?

A. Mr. Hatton retired as vice president—assistant secretary and assistant treasurer of the Denver, and was unemployed thereafter.

Q. Did your company salary stop when the office closed? A. It did. [310]

Q. Since that time have you been receiving a pension from the company?

A. I have, since May 1, 1945.

Q. In what amount?

A. At first it was \$89.45, but at the present time it is \$65.54 a month.

Q. What was the occasion for the reduction?

A. Well, the Railroad Retirement Board increased the maximum benefits under the Retirement Act 20%, and that would have brought my retirement pay up to \$140, and under the provisional retirement plan of the Western Pacific Rail-

(Testimony of Michael J. Curry.)

road Company, that was deducted, the amount of the increase, from what I was receiving from the company, and I now get \$65.54 a month.

Q. Is that a voluntary retirement plan?

A. It is a provisional retirement plan.

Q. It may be terminated?

A. It may be terminated at the will of the company or the board.

Q. Now when the office was closed at 37 Wall Street and you moved over to 40 Wall Street, where in 40 Wall Street, physically, was your office?

A. I was on the 52nd floor. The firm of Whitman, Ransom, Coulson and Goetz occupied the 51st and 52nd. I was on the 52nd floor in close proximity to Mr. James K. Polk's office, of tax counsel. [311]

Q. Well, how far was Mr. Polk's office from your office?

A. Oh, I would say it's 30 or 40 feet.

Q. Now did Miss Valouch have an office in the Coulson office at the same time?

A. Yes, she had an office adjoining that of Mr. Polk's.

Q. And adjoining yours?

A. No, it was across the hall.

Q. Across the hall. What became of the files and records that had been at 37 Wall Street when the office was closed?

A. Well, Mr. Elsey sent Mr. Droit, the secre-

(Testimony of Michael J. Curry.)

tary of the railroad corporation, to confer with me as to the disposition of the files, and he designated certain files that should be sent to the headquarters in San Francisco, others to be turned over to the Whitman, Ransom, Coulson and Goetz firm as perhaps being useful in connection with tax matters. In addition, I had the corporation files, which were separate and distinct from these other files, and as well, the so-called trustees' files, the reorganization files. Those, of course, I understood, were in the custody of Mr. Schumacher, but he didn't want them to be taken to his house or anything to be done with them. He said, "Do with them as you please." And so the only thing I could do was to take them over there with me to the room that I had at 40 Wall Street. They remained there with me until some time later in 1946 or 7. I am not sure which.

Q. Now the tax files, the income tax files—where did they go? [312]

A. The tax files, which were also separated from our other files, were transferred to the office of Whitman, Ransom, Coulson and Goetz.

Q. And where were they kept?

A. They were kept on the 52nd floor, on which I was, and in which Mr. Polk and Miss Valouch also occupied.

Q. And in whose room?

A. They were in Miss Valouch's room.

Q. Where are those files now?

(Testimony of Michael J. Curry.)

A. They are at the present time in the custody of Mr. James K. Polk.

Q. You haven't those files?

A. I have nothing in my possession having to do with tax files.

Q. You went over to Mr. Coulson's office about May 1, 1945. How long did you remain in those offices?

A. As I stated a while ago, I went over there June 1, 1945, and remained there until September 10, 1948.

Q. How did you happen to leave?

A. Well, I was directed by Mr. Coulson who came to my office, to vacate the room as they wished to use it, to have one of their employees or partners use that room. That was on September 10, which was a Friday. I immediately arranged to transfer my belongings down to our counsel's office at 44 Wall Street, and they remained there until I was able to locate [313] space at the old address, 37 Wall Street.

Q. Did Mr. Coulson, when he came into your office on Friday, tell you when he wanted the room?

A. He did. He said he wanted it the following Monday.

Q. And you got out by Monday?

A. I was out before Friday, the close of business Friday.

Q. Did he give any reason for telling you to get out other than——

(Testimony of Michael J. Curry.)

A. Other than they wanted the space. Pardon me, he came to my office about noontime, around twelve o'clock and told me this, and then I came back to the office and hustled about and got the files over to Mr. Nicodeums' office that afternoon.

Q. How long did you continue to receive the payments from the Coulson firm?

A. Until December 31, 1948.

Q. Nothing has been paid by the Coulson firm to you since that date, is that correct?

A. That's correct.

Q. During the two and a half years that you were in Mr. Coulson's office, what duties, if any, did you perform for the Coulson firm?

A. Well, so far as duties under the retainer are concerned, the only services that I performed so far as I can remember was the signing of income tax returns and the power of attorney. [314]

Mr. MacKinnon: I move to strike out the answer, your Honor, because he couldn't do that on the basis of the retainer. He did it as president of the holding corporation. His testimony is completely inconsistent, legally, with the facts.

The Court: Well, is that a legal matter?

Mr. MacKinnon: That is a legal matter, but I want to point these things out, because your Honor will note that the witness is very zealous in making his answers.

The Court: Well, this is the retainer that there

(Testimony of Michael J. Curry.)

is evidence of in the form of document, isn't that right?

Mr. Clark: That's right.

Mr. Phleger: Correct. It seems to me it is entirely appropriate to ask him what he did in return for the payment of that retainer.

Q. (By Mr. Phleger): Did you perform any other services for Mr. Coulson?

A. Not for Mr. Coulson, no.

Q. For anyone else?

The Court: You mean you sat there for a couple of years or so and signed your name a few times?

A. That is about all, sir, except that I did carry on whatever necessary thing had to be done for the corporation, such as answering letters of stockholders, inquiries and other incidental things that didn't occupy much of my time, because the [315] corporation was a dying concern, I thought.

Q. (By Mr. Phleger): Where was the corporation's principal office following the closing of the office at 37 Wall Street?

A. The principal office was moved to 100 West 10th Street, Wilmington, Delaware.

Q. And what was that?

A. The corporation trust company.

Q. That was your official headquarters?

A. And they were also named the transfer agents for the stocks of the corporation.

Q. I think you have already testified, have you

(Testimony of Michael J. Curry.)

not, that during this period you had received no compensation from the corporation, that is, since June 1, 1943? A. Correct.

Q. About how many stockholders has the Western Pacific Railroad Corporation?

A. I would say approximately 4700.

Q. Do any of them live in the west?

A. Yes.

Q. How many?

A. Well, in California we have over a thousand stockholders, but the stock of the corporation is distributed among the 48 states of the Union.

Q. Now, Mr. Curry, did you ever prepare a tax return? A. No, sir. [316]

Q. For either the corporation or the company?

A. No, sir.

Q. Tax returns, however, were prepared in the office at 37 Wall Street, were they not?

A. They were.

Q. Who in that office worked on tax returns?

A. Miss Valouch.

Q. Did she have any assistance?

A. Yes, yes, whenever it *came to* file our return, she brought in the firm of Lybrand, Ross Bros. & Montgomery, consulted them, and between them they prepared the returns and placed them before me for signature.

Mr. Clark: This testimony is directed to what time, counsel?

Mr. Phleger: Just a moment, I will do that.

(Testimony of Michael J. Curry.)

Q. What period of time are you referring to in the testimony you have just given?

A. Up to the year 1942, as I recall.

Q. What, if anything, did Mr. Schumacher have to do with income tax returns? A. Nothing.

Q. What happened with respect to the preparation of the 1942 tax return, as distinguished from the tax returns for prior years?

A. Well, early in 1943, the firm of Whitman, Ransom, Coulson and Goetz were designated as the tax counsel of the corporation, [317] and the '42 returns were prepared by that firm or a member of that firm.

Q. Who told you that the Coulson firm was to advise with respect to and prepare the tax return?

A. Mr. Schumacher gave me that information, and I believe Mr. Nicodemus.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 50 which is a letter dated May 20, 1943, signed by James K. Polk and addressed to you as vice president of the Western Pacific Railroad Company. (Handing to witness.) Do you recall receiving that letter? That is the so-called "paradox" letter. A. Yes, I do.

Q. Can you state what happened with the letter when you received it?

A. I read it, didn't thoroughly understand it—

Mr. MacKinnon: I move to strike that out, your Honor, on the ground it is not responsive. He was asked what he did with it.

(Testimony of Michael J. Curry.)

The Court: All right, that may go out. You read it and then what happened?

A. (Continuing): After reading it, I marked it over to Mr. Schumacher to note, which he did, and he marked thereon in his blue pencil, "An interesting letter." He handed it to me and suggested I should give a copy to Mr. Nicodemus, our counsel, which I did. [318]

Q. (By Mr. Phleger): Who was Frank L. Reilly.

A. I know nothing about him, except that he was engaged by the Whitman, Ransom, Coulson and Goetz firm to help out in tax matters, federal tax matters.

Q. Well, when did you first meet him?

A. Well, he came to the office at 37 Wall Street, I think, early in 1943, and Miss Valouch introduced me to him and said that he was to work on the income tax returns, and we provided space for him in the board room, and he was there off and on for some time. He and Miss Valouch prepared the tax returns.

Q. Who was James K. Polk?

A. Mr. James K. Polk was a partner in the firm of Whitman, Ransom, Coulson and Goetz.

Q. Did you see him from time to time in connection with tax matters?

A. I saw him from time to time, yes, but it was only casually. I didn't consult him on tax matters.

Q. Did you have extensive conversations with him?

A. No, I did not.

(Testimony of Michael J. Curry.)

Q. Who was Robert E. Coulson?

A. Mr. Robert E. Coulson is also a member of the firm of Whitman, Ransom, Coulson and Goetz.

Q. Did he come to 37 Wall Street at all in connection with these tax returns? [319]

A. Not to my knowledge.

Q. Did you ever discuss the matter of these tax returns with him? A. I did not.

Q. I will now direct your attention to the signing and filing of the 1942 tax returns. Who prepared those returns?

A. Those returns were prepared, I understand, under the supervision of Mr. James K. Polk by Miss Valouch.

Mr. MacKinnon: Your Honor, I object to the witness' testimony, if he says he understood. If he doesn't know, he can't make a responsive answer.

The Witness: I will change the answer to "under the supervision of Mr. Polk."

Q. (By Mr. Phleger): Did you have anything to do with their preparation?

A. Nothing whatever.

Q. When did you first see them?

A. I saw them when they were placed before me, I think it was in May, 1943. They were placed before me for signature in behalf of the corporation.

Q. Who presented them to you?

A. Miss Valouch.

(Testimony of Michael J. Curry.)

Q. What did she say, if anything?

A. I asked her if they were O.K. or all right and had Mr. Polk's approval, and she said, "Yes." I then signed them. [320]

Q. Did you consult the Board of Directors or any officers of the railroad corporation prior to signing the '42 returns as to whether or not you should sign them? A. No, I did not.

Q. Did Mr. Reilly, Mr. Polk, or anyone else advise you prior to signing the 1942 returns that the railroad corporation didn't have to sign them unless it wanted to? A. No, sir.

Q. Do you remember the circumstances surrounding the signing of the 1943 returns?

A. Yes.

Q. Do you know who prepared them?

A. They were prepared in the office of Mr. Polk, the tax counsel, and the figures, schedules, were assembled by Miss Valouch.

Q. Did you assist in their preparation?

A. I did not.

Q. By the way, Mr. Curry, did you keep the books or have anything to do with the books in 37 Wall Street?

Mr. MacKinnon: May I inquire as to the time, your Honor?

Q. (By Mr. Phleger): At any time.

A. I had nothing whatever to do with the book-keeping.

Q. Are you a bookkeeper?

(Testimony of Michael J. Curry.)

A. I am not.

Q. Did you ever make any entries upon books?

A. I never put pen or pencil to any book of the corporation. I depended entirely on the employee who was delegated that work.

Q. What are the circumstances surrounding your signing of the 1943 return?

A. The circumstances were similar to the previous years. The returns were placed to me in complete form by Miss Valouch. I asked her the same questions, if Mr. Polk approved them. She said, "Yes" and I signed them.

Q. Did you examine the schedules attached to the 1943 returns?

A. I did not. I merely looked over the copy—the original—the first sheet where the computations were down to the net or the taxable figure, and that was as far as I went.

Q. That is the sheet upon which you affixed your signature, is it not? A. Correct.

Q. Did you consult the directors of the corporation or any of its officers as to whether or not you should sign that 1943 return before you signed it?

A. I did not.

Q. Were you advised prior to signing that return that the corporation need not file a consolidated return if it did not wish to?

A. I was not so advised.

Q. Were you given any advice in connection with the filing of that return by Mr. Coulson, Mr.

(Testimony of Michael J. Curry.)

Reilly, or any member of Mr. [322] Coulson's firm? A. I was not.

Mr. Adams: Just a moment. What kind of advice do you refer to? Written or oral?

Mr. Phleger: Any kind.

Mr. Adams: Do you exclude from your question the document you just exhibited to the witness?

Mr. Phleger: I do not consider that a letter of advice. If you do, we will have the answer amended.

Mr. Adams: Let us have the answer amended, because it shows on its face it is a full letter of advice and is addressed to Mr. Curry.

Mr. Clark: For a different year.

Mr. Adams: I thought the answer was general.

Mr. Phleger: It is.

The Court: You can take the witness on cross-examination.

Q. (By Mr. Phleger): I show you, Mr. Curry, Plaintiff's Exhibit No. 54, which is a letter on the Coulson letterhead dated January 11, 1944, addressed to Mr. Elsey advising with respect to the 1943 tax accruals, their reversal, and other matters. That is the so-called "opinion" letter. Did you receive a copy of that letter?

A. I did not.

Q. Did you ever see a copy of that letter?

A. I never did. [323]

Mr. Clark: Mr. Phleger, is that the January 11 opinion?

(Testimony of Michael J. Curry.)

Mr. Phleger: Yes.

Q. I direct your attention now to the signing and filing of the 1944 returns. Who prepared those returns?

A. Those were prepared in the office of Mr. Polk.

Q. Did you have anything to do with their preparation? A. I did not.

Q. What took place when you signed the returns?

A. It was placed before me by Miss Valouch and I inquired if it had Mr. Polk's approval, and she said it had, and it was all right to sign, and so I signed it.

Q. Did you examine the schedules attached to the return? A. No, I did not.

Q. Did you consult the directors or officers of the corporation prior to signing that return as to whether or not you should sign it?

A. I did not.

Q. Were you advised prior to the time that you signed it that the corporation need not file consolidated return if it did not choose to do so?

A. I was not so advised.

Q. Where were you when you signed the 1944 return?

A. I was at 40 Wall Street in the office of Whitman, Ransom, Coulson and Goetz.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 6, which is a [333] claim for refund of taxes for

(Testimony of Michael J. Curry.)

the year 1942, signed by the Western Pacific Railroad Corporation, by yourself as president. You signed the original of that, did you not?

A. I did.

Q. What were the circumstances under which you signed it?

A. I was at 37 Wall Street at the time, and Miss Valouch placed it on my desk with the statement that it had Mr. Polk's approval and it was all right to sign, so I signed it.

Q. Did you have anything to do with its preparation?

A. I did not.

Q. Did you consult any of the corporation's directors or officers prior to signing it as to whether you should sign it?

A. I did not.

Q. Did you have anything to do with its preparation?

A. I did not.

Q. I show you, Mr. Curry, Plaintiff's Exhibit 64, a letter dated May 31, 1946, on the letterhead of the Coulson firm, addressed to Mr. C. R. Krigbaum, internal revenue agent in charge, signed by Whitman, Ransom, Coulson and Goetz; that has been termed the first Krigbaum letter, your Honor. Did you ever see the original or a copy of that letter?

A. No, sir.

Q. Were you ever advised that it had been sent?

A. No, sir.

Q. I now show you, Mr. Curry, Plaintiff's Exhibit 65, a power [325] of attorney of the Western Pacific Railroad Corporation dated June 26, 1946,

(Testimony of Michael J. Curry.)

running to James K. Polk and others. Do you recall having executed the original of that power of attorney? A. I do.

Q. At whose instance did you sign it?

A. At 40 Wall Street in the suite of Whitman, Ransom, Coulson and Goetz.

Q. Did you consult any of the directors or any officer of the corporation before you executed that power of attorney as to whether or not you should sign it?

A. I did not, as I depended entirely on our tax counsel for putting those things before us.

Mr. MacKinnon: I move to strike out everything after "I did not" as not responsive.

Mr. Phleger: It may go out as far as I am concerned.

The Court: It may go out.

Q. (By Mr. Phleger): Did you consult with anyone prior to signing that power of attorney?

A. Not to my knowledge.

Q. I now show you attachment to Plaintiff's Exhibit 7, a letter dated [326] February 11, 1947, addressed to the Hon. Joseph D. Nunan, Jr., Commissioner of Internal Revenue, Washington, D. C., signed by the Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact. Was that letter ever shown to you previous to its being sent?

A. No, sir.

Q. Did you ever see a copy of it?

A. Some months later I did.

(Testimony of Michael J. Curry.)

Q. Can you recall the approximate date when you first saw a copy of that letter?

A. Well, it is my thought it was somewhere around April, some time in April.

Q. That is April of 1947? A. Yes, sir.

The Court: I am confused there. Exhibit 7——

Mr. Phleger: That is attached to the stipulation, your Honor.

The Court: Oh, I see. There was the stipulation that was entered into in September, 1947.

Mr. Phleger: Yes.

Q. I show you now letter purporting to be signed by you dated April 4, 1947, addressed to Pierce & Greer. Do you remember sending that letter? A. Yes, sir.

Mr. Phleger: Your Honor, I offer in evidence as Plaintiff's [327] Exhibit 68 documents which have been identified as intervenor's 41A, 41B, C, D, E, and F.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 68.)

Mr. Phleger: The first sheet is the letter I have just referred to. It is addressed to Mr. Nicodemus by Mr. Curry and states:

“Herewith copy of letter dated April 2, 1947, and enclosure from Mr. James K. Polk in regard to the corporation's federal income taxes for the years 1942, 1943, and the period January 1 to April

(Testimony of Michael J. Curry.)

30, 1944. A copy is also being sent to Mr. A. Perry Osborn. This will be presented to the board at a meeting called for next Tuesday, the 8th, for consideration and such action as the board may direct.

“Enclosure copy to Mr. A. Perry Osborn.”

The enclosed letter, the next sheet, is on the letterhead of the Coulson firm, signed by James K. Polk, dated April 2, 1947, and addressed to Mr. Michael J. Curry, President, the Western Pacific Railroad Corporation, Room 5205 Wall Street, New York, New York.

Q. That was the number of the room occupied by you, was it not?

A. 5205 at that time, yes, at 40 Wall Street.

Q. And that was a couple of doors away from Mr. Polk's office, [328] who signed it?

A. Yes, sir.

Mr. Phleger: It says:

“Dear Mr. Curry:

“As you doubtless know, Internal Revenue Agent Thomas Leahy has been conducting an examination of the operations of the Western Pacific Railroad Corporation and its affiliated companies for the calendar years 1942 and 1943 and the period from January 1 to April 30, 1944. His activities in this connection seem to be approaching completion. I have thoroughly covered with him all phases of the matter and this report is being made to you so that you may be advised of its current status.

(Testimony of Michael J. Curry.)

“In the course of his examination, Revenue Agent Leahy originally determined on a tentative basis that the worthlessness of the stock of the Western Pacific Railroad Company occurred in the year 1940. Although in view of the intermediate status of the matter no formal advice or notice of a proposed deficiency had been or could then be received, our tentative computations indicated that the deficiencies that would be asserted on the basis of any such determination as to the year of loss, would be considerably in excess of any reserve provision heretofore made against such tax [329] liability. We immediately took the matter up with the local office of the internal revenue agent in charge, and various conferences were held at which were presented the taxpayer's views that this loss occurred in the year 1943.

“The matter was submitted by the internal revenue agent in charge to the Office of the Commissioner of Internal Revenue in Washington, D. C., for advice. Conferences were held with bureau officials in Washington in connection therewith. It was first proposed by the bureau officials at Washington to support the tentative determination of the field examiner that the stock became worthless in 1940. In further conferences in Washington it was suggested that the matter was one appropriate for disposition by settlement or agreement between the parties. At the request of the Commissioner's Office, a written proposal as a basis

(Testimony of Michael J. Curry.)

for settlement was made by me as attorney in fact under date of February 11, 1947, copy of which I am enclosing."

Q. That was the Nunan letter I have just shown you, was it not? A. It was.

Q. And this is the first notice that you had that it had been sent, February? A. That is right.

Q. This letter being April? [330]

A. Yes.

Mr. Phleger:

"After consideration by the bureau officials, the case was recently returned by them to the local office of the internal revenue agent in charge. Revenue Agent Leahy, whose investigation was to a large extent suspended during the pendency of the matter in Washington, has now resumed his activities and is, we believe, now in the process of completing the draft of his report. His conclusions, we are hopeful, are now in accord with a proposal submitted to the Washington officials.

"The proposal as to a possible basis for settlement is presently pending in the local office of the Internal revenue agent in charge and will continue in that status until final action thereon can be taken by the appropriate bureau officials. Under the bureau practice and the necessities of this particularly difficult case, there will probably be an interval of at least two months before an agreement can be reached with those who must approve it, if it is accepted. It can be revoked at any time prior to such

(Testimony of Michael J. Curry.)

acceptance and there will be ample time for consideration by you and your associates before definitive action is taken.

“If the government approves the proposed basis for settlement, it will be an unusually advantageous disposition [331] of the matter. The doubts as to the construction of the applicable Internal Revenue Code provisions are so real and the factual background so involved, that the government would certainly be fully justified in resisting our claim in its entirety, if complete recovery were to be sought for 1942 as well as avoidance of all liability for 1943 and the period ended April 30, 1944. We would then be compelled to pursue our rights even to the Supreme Court of the United States. In any such extended litigation, we would necessarily incur all of the risks usually attendant upon any litigation plus the inevitable bringing to bear on the problem, in behalf of the government, of a succession of fresh and ingenious minds, eager to establish full tax liability in a case involving such large sums. The determination of the year of worthlessness in a factual matter involving a risk of loss which in itself, in my carefully considered opinion, fully justifies the proposed basis of settlement. This is entirely apart from other serious defenses which would most certainly be asserted by the government, if it were to contest our position in the case.

“It is, therefore, my definite recommendation that in the event the government advises us of its

(Testimony of Michael J. Curry.)

willingness to close the matter on the basis suggested in the [332] attached proposal, that the matter be so disposed of as promptly as possible. You will, of course, be advised promptly of any definitive corporate action required from your corporation to that end. I cannot impress upon you too much the depth of my conviction as to the importance of moving promptly when and if opportunity arises to close this matter on the basis proposed. I am fortified in this by the years of my experience in the Bureau of Internal Revenue and my knowledge of the extreme sensitivity which attends the situation in the Bureau in any case of this magnitude.

“I will be glad to discuss this matter with you and your associates at any convenient time.”

Attached to it is the Nunan letter of February 11, 1947, already in evidence, which suggests as a basis of settlement waiver of the claim for refund for the year 1942 and closing of the 1943-1944 cases upon the basis of no tax to be paid.

The Court: How do you suppose they ever got the government to agree to this matter?

Mr. Phleger: I assume——

The Court: Do you think the young men were not so alert at this time?

Mr. Phleger: I assume it is because it is within the provisions of law and the regulations which entitled——

The Court: I am just wondering—it is not per-

(Testimony of Michael J. Curry.)

tinient to this [333] case—what was the reason why there was an abandonment of the claim for refund of the amount that was paid in 1942? I suppose that is a complicated matter.

Mr. Adams: Mr. Polk will be a witness. He handled the transaction, and I am sure he would be the man best qualified to tell your Honor the answer to all of these questions. But it is the fact, as I stated to your Honor, that something like a year and a half ago this matter came before the Bureau in the regular way, and the Bureau are the watchdogs of the treasury——

The Court: I am not complaining about it; I am just wondering how they were so successful.

Mr. Adams: I think we shall satisfy your Honor before this case is over that the Bureau did wisely and that all the suggestions held forward here in a general fashion of some enormous windfall are nothing but pure imagination.

The Court: I am not so sure about that.

Mr. Clark: I think probably the form of the settlement was a practical solution, your Honor, when we regard the distinction between 1942 and 1943-1944.

The Court: Maybe.

Q. (By Mr. Phleger): Mr. Curry, I show you now a letter purporting to be signed by you, addressed to Mr. James K. Polk, dated May 5, 1947. Is that your signature? A. Yes, it is.

Mr. Phleger: I offer as Plaintiff's exhibit No.

(Testimony of Michael J. Curry.)

69, otherwise [334] identified as intervener's exhibit 172, a letter from Mr. Curry to Mr. Polk, dated New York, May 5, 1947.

(The document referred to was thereupon received in evidence and marked Plaintiff's Exhibit 69.)

Mr. Phleger:

"After the conference between the board committee dealing with corporation tax matters, and yourself, held in your office on April 15, we have further considered the questions involved and the points raised at the conference.

"We are prepared to recommend to the board the sending to you of a letter of general approval of the proposed tax settlement outlined in your letter to the corporation under date of April 2, signed by myself as president, with a copy of an authorizing resolution of the board.

"We will expect to be informed as to the progress of the negotiations and if there are any changes in the proposed settlement the corporation must be entirely free to reconsider its approval. [335]

"Although we wish to be entirely cooperative in this matter, the corporation finds itself embarrassed by the action of The Western Pacific Railroad Company in opposing judicial settlement of the allocations of tax benefits, if any, derived from the application of the capital losses of the corporation for the benefit of the group." and so on, "—about the litigation."

(Testimony of Michael J. Curry.)

I want particularly to call your attention to the fact that in this letter to Mr. Polk, Mr. Curry characterizes Mr. Polk as counsel for both the railroad company and the railroad corporation. I will offer that as Plaintiff's Exhibit 69.

Mr. Adams: May it be stipulated that copies of this letter went to Mr. Nicodemus, Mr. Osborn and Mr. Wood?

Q. (By Mr. Phleger): Did they?

Mr. Adams: Yes, it is so stated on the letter.

Mr. Phleger: I will now offer as Plaintiff's Exhibit 70 a letter otherwise identified as Interveners' 173, a letter from James K. Polk, on the letterhead of the Coulson firm, dated May 6, 1947, addressed to Mr. M. J. Curry, 40 Wall Street, Room 5205.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 70.)

"Dear Mr. Curry:

"This acknowledges your letter of May 5, as to the pending tax matters for the years 1942, 1943 and 1944, the Western Pacific group in which I act as tax counsel.

"Obviously, as your letter suggests, the only thing that I could do in connection with the possible stipulation between the various interested companies in connection with pending litigation between them as to allocation would be to 'use my good offices.' The use of my good offices would necessarily be limited to calling to the attention of the other members of the group the fact that I have impressed upon your

(Testimony of Michael J. Curry.)

group, namely, that there is a common interest in concluding promptly the proposed settlement which I have been negotiating with the Treasury Department. It would, in my judgment, be disastrous if controversy between members of the group which could properly await subsequent disposition should make impossible a settlement along the lines heretofore outlined to your group.”

I take it that refers to his previous letter, in which he outlines just what settlement is proposed, and I think the balance of the letter is not important. The last paragraph reads:

“Naturally, I am at the disposition of you and your associates and of any other member of the corporate group as to the method of computing the settlement or any other information which will be helpful in ironing out such differences as may exist between members of the corporate group.

“In closing, however, let me emphasize again the vital element that this controversy as between the members of the corporate group shall not be allowed to interfere with an advantageous settlement with the Treasury Department, as to which there is clearly no conflict in interest.”

Copies were sent to Mr. Nicodemus, Mr. A. P. Osborn, Mr. Willis D. Wood.

I will now offer as Plaintiff's Exhibit 71 a letter otherwise identified as Interveners' Exhibit 175. It is a letter on the letterhead of the Coulson firm, dated May 19, 1947, addressed to Mr. C. R. Krig-

(Testimony of Michael J. Curry.)

baum, Internal Revenue Agent in Charge, 225 Broadway, New York, New York.

(The letter referred to was received in evidence and marked Plaintiff's Exhibit 71.)

Mr. Phleger: To identify it from the earlier Krigbaum letter, I have referred to it as the "second Krigbaum letter." It is signed, "The Western Pacific Railroad Corporation, James K. Polk, Attorney in Fact," and contains in substance the same material that is contained in the Nunan letter of February.

Q. (By Mr. Phleger): I show you this document, Mr. Curry, and ask you if you ever saw it before it was written and dispatched (handing to witness.)

Mr. Adams: We would object to counsel's characterization, which we believe to be inadvertently erroneous, in so far as it is a statement that is substantially identical with the Nunan letter, but the documents will speak for themselves.

Mr. Phleger: Well, that is an inadvertence, if that isn't the fact. Let me look at it. This says:

"Reference is made to the conference held in your office May 6, with regard to the tax liabilities of The Western Pacific Railroad Corporation, and its affiliated companies, for the taxable years 1942, 1943, 1944.

"At this conference an agreed basis of settlement of the tax liabilities involved was reached and this letter contains the written undertaking of the taxpayers effectuating the settlement."

(Testimony of Michael J. Curry.)

Mr. Adams: You have now read enough to establish my point.

Mr. Phleger: I would like to read the rest of it.

“The taxpayer”——

and the taxpayer, as signed, is “The Western Pacific Railroad [339] Corporation”

“——on behalf of itself and its affiliated subsidiaries agrees to settle and determine the tax liability of said corporation for the taxable years '42, '43, and '44 in the amount shown on the returns as filed. This proposal of settlement accordingly relates to the consolidated returns filed for the calendar years 1942, 1943 and 1944, in which said return for 1944 The Western Pacific Railroad Corporation included then its subsidiaries for the period January 1, 1944 to April 30, 1944, during which period affiliation existed.

“This settlement does not relate to or affect the tax liability of the subsidiaries from and after April 30, 1944, when their affiliated status with The Western Pacific Railroad Corporation was terminated.

“As part of the settlement, The Western Pacific Railroad Corporation, on behalf of itself and its affiliated subsidiaries, will, if this settlement is accepted, execute or procure the execution of any other or further agreements or assurances requested by the Commissioner of Internal Revenue for the purpose of effectuating the settlement. The settlement reached with your office is agreed to without prejudice, however, to the rights or claims of the

(Testimony of Michael J. Curry.)

parties in the event the settlement is not accepted by the Commissioner of Internal Revenue.

“Authority for settlement of the tax liabilities of the above-named taxpayers by the undersigning company is contained in power of attorney heretofore filed with your office.”

Q. (By Mr. Phleger): I think I asked you whether you had seen that letter before it was sent.

A. The Krigbaum letter?

Q. Yes. A. I did not.

Q. When did you first hear that it had been sent?

A. I never heard that it had been sent. This is the first time that I knew of it.

Q. Now, when did you hear that the offer contained in that letter had been accepted? [341]

A. I believe it was sometime in August, 1947.

Mr. Phleger: I have the Nunan letter here now, and I really don't see the difference between it and the second Krigbaum letter, but I suppose there is.

Q. (By Mr. Phleger): I show you an attachment to Plaintiff's Exhibit 7, which is the stipulation that was heretofore filed regarding the 1942 refund. There are two letters attached to it, both signed by E. I. McLarney, Deputy Commissioner. Do you recall when you saw those two letters (indicating to witness)?

A. Yes; it was sometime in August 1947.

The Court: Well, we will take the afternoon recess at this time.

(Recess.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Phleger): Mr. Curry, when did you first hear that the loss of the value of the corporation stock was being used in connection with income tax?

Mr. MacKinnon: Oh, that question, your Honor, is a question of "hear of it" when he saw it as well as hearing of it? You mean whether somebody told him? I am just asking for an explanation of the question.

Mr. Phleger: Well, either one or both, if you want.

Mr. Clark: Became aware.

A. I first learned of the actual writing off of the loss of the stock holdings of the corporation at the time that the 1943 return was placed before me and Miss Valouch stated that [342] the stock loss had been written off on that return.

Q. And you noticed, did you, on the first sheet of the return as to what the tax was?

A. I did.

Q. And what did that show?

A. Well, it showed, as I recall, approximately \$75,000,000.

Q. No, I mean as to the tax.

A. Oh, as to the tax. No tax to be paid.

Q. Yes.

Mr. Phleger: And I will offer as Plaintiff's Exhibit 72 a document otherwise identified as Interveners' Exhibits 167, 168 and 169. Now, the top sheet is a letter from Mr. Elsey on the letterhead of

(Testimony of Michael J. Curry.)

Western Pacific Railroad Company, under date of February 11, 1947, by air mail, addressed to James K. Polk, Esq., care of Carlton Hotel, Washington, D. C.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 72.)

Mr. Phleger: It reads as follows:

"Dear Mr. Polk:

"In order that you may have definite authorization from this company to proceed in connection with the pending controversy as to Federal income taxes for the years 1942, 1943 and 1944, as to which you hold power of attorney, I have today conferred with all available directors. All of [343] the directors I have been able to reach, constituting a majority of the directors, have concurred in the proposal that you submit in writing to the Commissioner of Internal Revenue a definite proposal that the three years, 1942, 1943 and 1944, be settled on the basis of no refund and no additional tax.

"We understand that the year 1944 is involved in this controversy so far as this company is concerned, only during the period of affiliation. That is, through April 30, 1944, and that for the balance of the year 1944, the taxes of this company will be determined on the basis of its separate return for that period, outside the affiliation."

Attached to it is a resolution of the board of directors of the defendant company authorizing the

(Testimony of Michael J. Curry.)

submission of the offer of settlement, which is contained in the Nunan letter.

Mr. Adams: The resolution was at a subsequent date, Mr. Phleger.

Mr. Phleger: Yes, the resolution was adopted at a meeting on the 4th day of March 1947. The Nunan letter, as I recall it, was written on February 12.

Mr. Adams: The 11th. [344]

* * *

Direct Examination For Intervenors

By Mr. Clark:

Q. Now, Mr. Curry, you are still the president of the plaintiff corporation, are you not?

A. I am.

Q. And are you receiving any compensation from it at the present time? A. No, sir.

Q. Am I correct in stating that you have received no [345] compensation from the plaintiff since on or about June 1, 1943?

A. That is correct.

Q. You are, however, receiving a pension from the defendant railroad company? A. I am.

Q. And in addition to that, do you receive a pension under the Railroad Retirement Act?

A. I do.

Q. And up to the last of the year 1948 did you receive the payments called for by the so-called retainer letter from Mr. Coulson's firm, which is in evidence in this case? A. I did.

Q. Now, let me direct your attention to the period commencing March 15, 1943, to April 30, 1945.

(Testimony of Michael J. Curry.)

Do you have that period in mind? A. I have.

Q. On or about March 15, 1943, did you become aware of a decision by the Supreme Court of the United States in the Western Pacific reorganization? A. I did.

Q. And was that shortly after March 15 of 1943? A. Yes, sir.

* * *

Q. (By Mr. Clark): At that time did you arrive at the understanding that that decision had any effect upon the stock in the railroad company owned by the plaintiff corporation? A. Yes.

Q. And what was that, please?

A. Well, it meant that the stockholdings of the corporation and the unsecured indebtedness were wiped out.

Q. And was that your understanding shortly after March 15, 1943? A. It was.

Q. Now, let me direct your attention to the situation in the so-called New York office—you testified to in your examination in chief by Mr. Phleger, during the period commencing—withdraw that.

During the period I just called your attention to—— A. Yes.

Q. You have testified that you gave instructions to the rest of the employees, is that right?

A. Yes, I instructed them.

Q. All right. Did anyone give instructions to you? A. Yes.

Q. And who was that, please? [347]

(Testimony of Michael J. Curry.)

A. Mr. Schumacher.

Q. Now, am I correct in stating that the New York office during that period of time was also the office of Mr. Schumacher, as one of the reorganization trustees in the reorganization of the Western Pacific Railroad Company? A. It was.

Q. And during that period of time were you employed in any capacity by the reorganization trustees?

A. Well, it is rather difficult for me to say. I continued in my employment as previously. We all went along just the same, but whether I was employed by the agent for the trustees or the trustees, it is a legal question, and I don't know that I can answer it.

Q. All right. Do you remember the occasion of the company going into bankruptcy back in August of 1935? A. I do.

Q. And do I understand that from that time on you continued to perform the same functions in the office at 37 Wall Street that you had performed previous to the date of the bankruptcy?

A. That is correct. .

Q. I see.

* * *

Mr. MacKinnon: The questions are all leading, your Honor.

Q. (By Mr. Clark): Will you please state, Mr. Curry, whether [348] there was any difference in the functions performed by you personally in the

(Testimony of Michael J. Curry.)

37 Wall Street office prior to the reorganization proceedings instituted in August of '35 and thereafter? A. There was no change.

Q. All right. Now, coming back again to the period commencing March 15, 1943, will you please tell us very briefly what functions you did perform in the office?

A. Well, as I have testified, I always considered myself as a chief clerk or office manager.

Mr. MacKinnon: Your Honor, I move to strike that out.

Mr. Clark: It may go out, your Honor.

The Court: If he has already testified to it, what is the good of going over it again?

Mr. Clark: I don't think he has specifically. It is one question I wanted answered, to make sure the record is complete on it.

The Court: All right.

Mr. Clark: I will do my best not to duplicate anything that Mr. Phleger has gone into.

Q. Just tell us briefly what you did in the office.

A. Well, I supervised the employees and I was careful to watch things, the matters that were handed by Mr. Schumacher. He was not very alert in later years, and he——

Mr. MacKinnon: Now, your Honor, I move to strike that, [349] all these gratuitous remarks of the witness. He can respond to the questions.

Mr. Clark: It may go out.

A. And he depended upon me to see that papers

(Testimony of Michael J. Curry.)

that were going in and out of the office were brought to the attention of everybody that might be interested in them and that was one of my functions.

Q. Were you also the office manager?

A. Yes.

Q. And who was head of the office?

A. Mr. Schumacher.

Q. Now, let me direct your attention to Mr. W. W. Hatton, who I think you have told us was an official of the Denver and Rio Grande?

A. Yes.

Q. During this period of time. Would you state whether or not Mr. Schumacher, during that period of time, held any office with the Denver and Rio Grande?

Mr. MacKinnon: I submit, your Honor, it is not the best evidence.

Mr. Clark: If he knows.

A. That is between the period March 15, 1943—

Q. Up to the time the office closed on April 30, 1945.

A. He resigned from the Denver and Rio Grande Western, but I do not remember just when. I don't think he was an officer of the Denver during that period. [350]

Q. I say, had he been an officer of the Denver and Rio Grande? A. Yes.

Q. What position had he held?

(Testimony of Michael J. Curry.)

A. He held the position of Chairman of the Board or Chairman of the Executive Committee of the Denver and Rio Grande Western, and those positions were alternated between the two owners, the Western Pacific Railroad Corporation and the Missouri Pacific Railroad Company.

Q. And Mr. Schumacher held that position while Mr. Hatton held his position as Assistant Secretary? A. Yes.

Q. During this period, Mr. Curry, commencing March 15, 1943, and on up to the time the New York office closed on April 30, 1945, was there any segregation as between employees who performed services for the holding corporation and those who performed services for the railroad company?

A. There was no segregation.

Q. Was there any segregation of duties performed by any employees between those two companies? A. No.

Mr. Clark: May it please your Honor, we will offer in evidence as Interveners' Exhibit 3 a memorandum which on the deposition was marked Railroad Company Defendant's Exhibit 106-A, to which is attached a slip addressed to Mr. Polk by M. J. Curry dated March 16, 1943, marked on the deposition as Railroad Company's Defendant's 106-B, and we will offer them as one exhibit, Interveners' 3.

(Memorandum, Curry to Polk, March 16, 1943, was received in evidence and marked Interveners' Exhibit 3.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Clark:) Now, Mr. Curry, I show you the documents which have just been received in evidence, and you will note that the slip reads, "Mr. Polk, herewith extract from AAR weekly information letter as per phone conversation of date. M. J. Curry, 3/16/43." I will ask you whether you sent the document to which that slip was attached to Mr. Polk on March 16, 1943. You will note the memorandum to which that slip is attached is a release by the American Association of Railroads concerning a tax department ruling.

A. Yes, I have a recollection that I sent it over to Mr. Polk.

Q. In what capacity were you sending material of this sort to Mr. Polk on March 16, 1943?

A. Anything and everything that had to do with tax matters I handled that way. I referred them to either Miss Valouch or Mr. Polk.

Q. At that time, namely, March 16, 1943, did you regard Mr. Polk as tax counsel for the corporation?

A. At that time—it was early in 1943 that I believe they were appointed tax counsel.

Q. I am asking you why you sent this tax ruling to him. I [352] will withdraw that question.

At the time you sent the tax ruling, which is part of Interveners' Exhibit 3, to Mr. Polk did you regard him as tax counsel for the holding corporation?

A. I do not recall.

(Testimony of Michael J. Curry.)

Q. Did you regard him at that time as tax counsel for the company? A. Yes.

Q. Now, you testified in response to questions put to you by Mr. Phleger that sometime early in 1943 Mr. Schumacher had advised you that Mr. Polk was taking over the tax representation of the corporation? A. That is correct.

Q. Do you remember that testimony?

A. I do.

Q. Did Mr. Schumacher so advise you before or after the date of the slip attached to Interveners' Exhibit No. 3, namely, March 16, 1943?

A. I do not recall.

Mr. Clark: May I have Mr. Curry's deposition opened?

Q. Mr. Curry, you remember your deposition being taken in this case in New York in the spring of last year? A. I do.

Q. Namely, about March 23, 1948?

A. Yes, sir. [353]

Q. That is, it was on that day, part of it?

A. Yes.

Mr. Clark: Your Honor, I shall refer to page 2819 of Mr. Curry's deposition in this case, and just follow me, if you will, Mr. Curry:

“Q. Let me direct your attention, Mr. Curry, to Railroad Company Defendant's Exhibit 106-A and -B, which is a copy of an Internal Revenue ruling concerning depreciation accounting, upon which appears the note apparently addressed by you to Mr.

(Testimony of Michael J. Curry.)

Polk on March 16, 1943, and I will ask you to examine that document (handing it to the witness).

A. Yes.

Q. Do you remember having sent the original of Railroad Company Defendant's Exhibit 106-B over to Mr. Polk on or about March 16, 1943?

A. Yes.

Q. Do you remember why you sent it to him?

A. Yes.

Q. Why?

A. I read carefully these weekly letters from the Association of American Railroads and they covered various subjects of interest to railroad executives, and so forth. Anything I saw in there that had to do with tax matters, whether I understood them or not, I sent over to Mr. Polk as tax [354] counsel.

Q. Mr. Curry, at that time, namely, on March 16, 1943, was it your understanding that the firm of Whitman, Ransom, Coulson & Goetz and Mr. Polk as a partner of that firm had been retained as tax counsel for the Western Pacific Railroad Corporation?

A. It is my recollection they had.

Q. When was it, do you remember—withdrawn. Did you have any part in the retainer of Messrs. Whitman, Ransom, Coulson & Goetz and Mr. Polk as a member of that firm as tax counsel?

A. I did not.

Q. For either the corporation or the company?

A. Correct.

Q. Did you have anything whatsoever to do with it?

A. Nothing whatsoever.

(Testimony of Michael J. Curry.)

Q. At some time were you advised that Whitman, Ransom, Coulson & Goetz had been retained as tax counsel for either the corporation or the company?

A. It is my recollection that Mr. Schumacher advised me they had been.

Q. Do you remember about when that was with reference to March 16, 1943?

A. It must have been early in 1943. I cannot remember.

Mr. Adams: I move to strike out that portion of the [355] statement 'it must have been.' I ask the witness to state his best recollection if he has any.

Q. (By Mr. Clark): What is your best recollection?

A. My best recollection is early in 1943.

Q. In view of the note from you to Polk, which appears on Railroad Company Defendant's Exhibit 106-A, and to which I just directed your attention, Mr. Curry, is your recollection refreshed with respect to the approximate time that you were advised that Whitman, Ransom, Coulson & Goetz had been retained as tax counsel? A. Yes

Q. Is it your recollection that you were so advised before or after March 16, 1943?

A. It is my recollection that it was before that date.

Q. Do you refer in that connection to your conversation with Mr. Schumacher to which you have just testified? A. Yes.

(Testimony of Michael J. Curry.)

Q. Were you ever consulted with respect to the retainer of Whitman, Ransom, Coulson & Goetz as tax counsel? A. No."

Q. Do you remember, Mr. Curry, that I asked you those questions on deposition and you gave the answers I just read to you? A. I do.

Q. And are they correct? [356]

A. To my present knowledge they are.

Mr. Clark: May it please your Honor, we will offer in evidence as Interveners' Exhibit 4 a letter dated March 17, 1943, that is, it is a copy of a letter addressed to Mr. Robert E. Coulson, Whitman, Ranson, Coulson & Goetz, 40 Wall Street, New York, and bearing a stamp "Original signed Charles Elsey" and an endorsement that a copy went to Mr. T. M. Schumacher, which was marked on the depositions as Railroad Company Exhibit 306. And also we offer the notations in green pencil—in fact, all the handwritten notations on this document being in blue pencil, "M. J. C." and signed—I can't make it out—and then in green, "Discussed March 23, 1943, M.C.V. to attach to tax papers, M.J.C."

Is that a sign of any kind?

Mr. Adams: That is a check mark in green pencil drawn through the blue pencil lines.

Mr. Clark: That is all. I will accept that.

(The letter referred to was received in evidence and marked Interveners' Exhibit 4.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Clark): Mr. Curry, I show you the letter which has just been received in evidence as Interveners' Exhibit No. 4, and I want to direct your attention to the first paragraph and the sentence reading: "Dear Mr. Coulson"—this being from Mr. Elsey—"This will reply to your letter of March 1 relating to depreciation on way and structures and its [357] relation to income tax," and then to the markings in green pencil which appear on the heading "Discussed March 23, 1943, M.C.V. to attach to tax papers, M.J.C.," which is already conceded to be your signature. A. Yes.

Q. Those green markings were placed upon the document by you on March 23, 1943, were they not?

A. That is right.

Q. What does the word "Discussed" mean?

Mr. MacKinnon: I object to that, your Honor.

Mr. Clark: Withdraw that.

Q. Does the word "discussed" on that exhibit evidence the fact that you discussed that letter with someone?

Mr. MacKinnon: I object to the form of the question. It is clearly leading.

Mr. Clark: Submitted. Withdrawn.

Q. What was the occasion for your putting the word "Discussed" on the exhibit?

A. This is a copy of the said letter——

Mr. MacKinnon: Your Honor, I move to strike out the witness' response.

A. (Continuing): ——which Mr. Schumacher received.

(Testimony of Michael J. Curry.)

Mr. MacKinnon: He can make direct responses.

Mr. Clark: We do not care about that, your Honor. All I care about is an answer to my question. [358]

The Witness: Mr. Schumacher got this copy, marked it out to me, and questioned it, and it was my custom to take it in and talk these things over with him.

Q. (By Mr. Clark): That is not my question. Did you discuss it with anyone on March 23, 1943?

A. Well, my statement——

Mr. MacKinnon: I move to strike out the answer and get a responsive answer.

The Court: He wants to know after you got the letter, did you take it in and talk it over with Mr. Schumacher?

The Witness: That is all I can state. Mr. Schumacher got the copy, marked it out to me, I went in and we talked about it, and that is all there was to it. So I just marked it "Discussed," put the date on, and marked it over to Miss Valouch to put in the tax papers.

Q. (By Mr. Clark): Do you remember what the discussion was ?

A. I do not. I do not recall it at all.

Q. Was Mr. Nicodemus present for the discussion?

A. There is nothing on here to indicate that he was, and I do not recall that he was.

Q. Will you please hold that exhibit for a moment?

(Testimony of Michael J. Curry.)

Mr. Elkington, may I have Plaintiff's Exhibit 39-A?

Q. I want also to show you, Mr. Curry, a letter addressed to Mr. F. C. Nicodemus, Jr., Pierce & Greer, 40 Wall Street, New York, likewise dated March 23, 1943, and signed by Mr. [359] Schumacher.

Mr. Adams: Will you identify the exhibit?

Mr. Clark: I think I did identify it as Plaintiff's 39-A and on deposition Interveners' 6, in which appears this statement:

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed is a tentative one, an extension having been granted until 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you to cooperate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final return."

Q. Does the reference in there to the conversation refresh your recollection as to whether or not you discussed Interveners' Exhibit 4 on any occasion with Mr. Nicodemus present? A. No.

Q. About this date, March 23, 1943, had you had any discussion with Mr. Nicodemus concerning tax matters affecting the corporation?

A. Yes, I have a recollection that I talked with

(Testimony of Michael J. Curry.)

Mr. Nicodemus about the possibility of filing these consolidated returns, [360] and it was about that time that the firm of Whitman, Ransom, were named as tax counsel.

Q. Was it at this time, on March 23, 1943, or was it sometime prior to March 16, 1943?

A. I do not recall at the moment.

Q. Will you still please hold that letter, Mr. Curry. Can you tell us who prepared, that is, who dictated or drafted the letter signed by Mr. Schumacher which has been received in this case as Plaintiff's Exhibit 39-A addressed to Mr. Nicodemus?

A. Can I tell you who dictated it?

Q. Yes, sir.

A. No, I can't definitely. I have an idea.

Q. Let us have your idea.

Mr. MacKinnon: I object to his ideas, your Honor.

Q. (By Mr. Clark): Let me ask this question: Didn't Mr. Nicodemus himself prepare that letter addressed to himself for Mr. Schumacher's signature?

Mr. Adams: That is leading. Your Honor, I take it the interveners are leading their own witness in the examination.

Mr. Clark: He is not our witness, your Honor. We represent stockholders, and as I told your Honor in the opening statement, the chips are going to fall where they may in this case.

The Court: What is the importance of this?

(Testimony of Michael J. Curry.)

Mr. Clark: I simply want to develop the fact, your Honor, because I think the evidence indicates that Mr. Coulson, on the basis of the memorandum already in the record on March 15, when he makes inquiry about the situation in the office at 37 Wall Street, simply took over the tax situation, and that he took it over with the consent and through arrangement with Mr. Nicodemus, and that this letter, which was written for the record, purportedly coming from Mr. Schumacher to Mr. Nicodemus, was written by Mr. Nicodemus himself, and the answer prepared on the same day by Mr. Nicodemus and Mr. Coulson went to work on the tax returns without bothering to get the consent of one trustee, Sidney Ehrman, who was not even consulted until a later date.

The Court: What difference does it make whether it was prepared by Mr. Nicodemus?

Mr. Clark: It shows, if it please your Honor, who was in control of these corporations so far as the tax matters were concerned.

The Court: Nicodemus was the attorney for the company.

Mr. Clark: And also the attorney for the railroad company, also the attorney for the debtor.

The Court: He was the attorney for the company. Now, what difference does it make whether the attorney for the company or the president of the company wrote the letter?

Mr. Clark: Because Mr. Nicodemus was not only

(Testimony of Michael J. Curry.)

the attorney [362] for this corporation but the attorney for the railroad company.

The Court: I know that, but so was Mr. Schumacher in both companies at the time. I do not see any difference in whether the attorney wrote the letter or the officer wrote the letter.

Mr. Clark: Very well, we won't pursue that.

The Court: I mean, it does not seem to have any importance. Lots of times attorneys write these letters.

Mr. Clark: To themselves?

The Court: What difference does it make? That is what lawyers are for. They write the letter and the principal signs it, if they want to get it in the right legal form. I see no particular significance to that.

Mr. Clark: Very well, your Honor. May I have the question answered?

Q. Did Mr. Nicodemus dictate that or prepare it?

A. I do not know. The only thing I know is——

Mr. MacKinnon: Just a minute. Just a minute. I object to these gratuitous remarks by the witness.

The Court: Everything after "I do not know" may go out.

Mr. Clark: We will consent that it go out.

Mr. MacKinnon: I submit, your Honor, you should instruct the witness to answer the questions because there has been a great deal of volunteering on his part. [363]

(Testimony of Michael J. Curry.)

The Court: I will rule on it when it comes up.

Q. (By Mr. Clark): Let me direct your attention, Mr. Curry, to the time when you signed the consolidated tax return in the name of plaintiff corporation for the year 1943, which the record in this case shows was on July 15, 1944. Have you that incident in mind? A. Yes.

Q. Where were you when you signed those returns?

The Court: He has already testified to that.

Mr. Clark: Not with respect to 1943, your Honor. He has testified with respect to 1942, with respect to 1944 and with respect to——

The Court: I thought Mr. Phleger took each one of the returns and the refund.

Mr. MacKinnon: That is my recollection of the record. It accords with yours.

Mr. Clark: I do not think he took 1943.

The Court: I think he stated, if my recollection is correct, in answer to Mr. Phleger's question that it was signed under the same conditions, circumstances. I may be wrong about that.

Mr. Clark: I think that is 1944.

The Court: He took up three instances, two tax returns and a refund, if I remember correctly.

Mr. Clark: That is all I want to establish, your Honor. [364] At the cost of one question may I have an answer?

The Court: You signed the returns and the refund claim all under the same circumstances, did you, Mr. Curry? Is that a fair statement?

(Testimony of Michael J. Curry.)

The Witness: Yes, your Honor.

Mr. MacKinnon: Your Honor, I do not think that is true at all because the witness' prior testimony is that he signed the 1942 and 1943 returns at 37 Wall Street.

Mr. Clark: That is right; they are in different places.

The Court: All right.

Mr. Phleger: I take it he meant by circumstances the same general conditions, not the locus. However, I think I asked him and he answered every one of those questions.

Mr. Clark: I will withdraw the question, then.

Q. At the time you signed the 1943 returns, Mr. Curry, did you have any conversation with Miss Valouch? A. The 1943 returns?

Q. Yes. The evidence shows they were signed—

A. Yes, I testified she informed me that the stock loss was being written off, and that was practically the only conversation we had. The return was in front of me. I looked at the first sheet all the way down the column, and I asked her if Mr. Polk approved this return as prepared. She said Yes, and so I signed it.

Q. Prior to your signing of the return had you received any [365] advice from Mr. Polk or anyone in the Coulson firm concerning any possible liability on the holding corporation in signing such consolidated return? A. No, I did not.

Q. At that time you knew, did you not, that it

(Testimony of Michael J. Curry.)

was proposed to use the stock loss to effect a tax saving for the railroad company? A. Yes.

Q. And for how long had you known that?

A. I do not recall. It was the talk off and on for some time.

Q. You knew at that time that a reserve had been set up in early 1944 as a reserve against possible tax liability in the event the Government did not accept that method of returning the taxes?

A. It is my recollection that that reserve was set up early in 1944—that is right, 1944.

Q. That is right. A. That is right, 1944.

Q. And that is the reserve that has been testified to in this case? A. Yes.

Q. Did you learn about that reserve soon after it was in fact created, in March of 1944?

A. Yes, I did. Mr. Schumacher told me about it. He was a trustee. [366]

Q. What was your understanding of the reason for setting that reserve up?

A. Well, the possibility of contingent tax liabilities, that was all. The settlement with the Government on those tax returns had not been determined or decided.

Q. At that time, namely, in March of 1944, did you know that it was contemplated to use the corporation's stock loss in a consolidated return to save taxes for the railroad company?

A. That was my knowledge at the time.

Q. You knew that was the plan? A. Yes.

(Testimony of Michael J. Curry.)

Q. Had you seen the annual statement of the railroad company for the year 1943 prior to the time you signed the consolidated returns for 1943?

A. You mean the annual report that they publish?

Q. Yes, to stockholders.

* * *

The Witness: What is the question again?

Q. (By Mr. Clark): Did you see the annual report of the [367] railroad company for the year 1943 at about the time it came out? A. Yes.

Q. Did you notice the statement in it regarding the proposed use of the stock loss of the corporation? A. Yes.

Q. For tax purposes? A. Yes.

Q. You knew these things prior to the time you signed the 1943 return, did you not?

A. I did.

Q. Did it occur to you at that time to ask anyone about retaining independent counsel for the corporation? A. Did it occur to me?

Q. Yes. A. I do not recall that it did.

Q. Did you seek advice from anyone at all before you signed these returns other than you have testified to?

Mr. MacKinnon: Your Honor, the question is vague and indefinite. Advice as to what?

Q. (By Mr. Clark): Did you consult anyone with respect to whether or not you ought to sign those returns prior to signing them?

(Testimony of Michael J. Curry.)

A. No, I did not, and as I have testified before——

Mr. MacKinnon: I move to strike out everything after “No, [368] I did not,” on the ground it is not responsive.

The Court: It has already been covered.

Mr. Clark: Very well.

We will next offer in evidence, if it please the Court, as Interveners’ Exhibit 5, I believe, a copy of a letter addressed to Pierce & Greer, 40 Wall Street, dated February 21, 1945, with a stamp “(Signed) M. J. Curry,” which has been marked as Railroad Company Defendant’s Exhibit 407-A on the deposition.

(The letter referred to was received in evidence and marked Interveners’ Exhibit 5.) [369]

Mr. Clark: This is the copy produced from the corporation’s files.

Q. Mr. Curry, at the time you signed the returns for 1943, on July 15, 1944, did it occur to you that the holding corporation, of which you were president, might possibly have some claim to share in the tax savings that you knew were being effected?

A. It did not occur to me at that time, no.

Q. Did that ever occur to you?

A. No, it never occurred to me.

Q. At any time? A. At any time.

Q. Not right up to the present time?

(Testimony of Michael J. Curry.)

A. Oh yes, it occurred to me in 1946.

Q. What was the occasion for—

A. When the suit was filed in the New York court.

Q. You mean it first occurred to you after the VanKirk action was filed in New York?

A. That was the first time that it ever occurred to me that we might possibly participate or had rights in that tax saving.

Q. Is that the first time that anyone ever mentioned to you, that is, anyone on behalf of the corporation, ever mentioned to you that the corporation might possibly be entitled to some share in those savings?

A. It is my recollection that that is the first time.

Q. Never discussed before that, so far as you know? [370] A. No.

Q. Prior to that time, namely, prior to the time the VanKirk case was filed in New York, to your knowledge had any claim been made by any one on the part of the holding corporation for any part of these tax savings? A. That is correct.

Q. Well, had a claim been made or not prior to that?

A. No claim had been made prior to the institution of the suit.

The Court: What do you mean? A claim by a stockholder?

Mr. Clark: By anybody, to these tax savings. This whole litigation was instituted by these inter-

(Testimony of Michael J. Curry.)

veners in New York.

The Court: I understand that, but the question is not clear to me. I suppose what you are trying to get at is this: Had anybody asked the corporation to take any action with respect to its rights, is that what you mean?

Mr. Clark: That was it. I will reframe the question, your Honor.

Q. Prior to the time the VanKirk litigation was filed in New York, Mr. Curry, in June of 1946, was any step taken by anyone to your knowledge to get the corporation to assert this claim?

A. No.

Mr. MacKinnon: I submit, your Honor, that is a responsive answer.

The Court: Give him a chance. Maybe he wants to change it.

Mr. MacKinnon: He gushes forth all the time.

The Court: You will have to be patient. Every witness is not as smart as the lawyers, and sometimes they have difficulty answering questions.

Q. (By Mr. Clark): Do you have anything to add, Mr. Curry?

The Court: Are you bothered about whether your answer it correct or not?

A. Yes, I am a little bit. I just want to explain my answer a little bit. That is all. I had no idea we had any rights. I relied entirely on our tax counsel——

The Court: That is not what he wants to know. What the lawyer wants to know who is examining

(Testimony of Michael J. Curry.)

you now is, did anybody, stockholder or otherwise, make any demand or request or claim upon the corporation of which you were president and assert a claim on behalf of the corporation for a share in any savings that might result from that return?

Mr. Clark: Prior to the VanKirk action.

The Court: Prior to the time you heard about this suit filed in New York.

A. Well, I know that some stockholders had brought the question up, and I referred them to Mr. Nicodemus because they were asking me legal questions.

Q. (By Mr. Clark): You have in mind Mr. Offerman? A. Yes.

Q. Mr. Jaffin and Mr. Wershil?

A. Correct. [372]

Q. At a time they appeared in your office in December 1943? A. Correct.

Q. Beyond that, were there any other efforts made, so far as you know, to get the corporation of which you were president to take action in this matter? A. No.

Q. Referring, Mr. Curry, to the letter which has just been received as Interveners' 5, dated February 1, 1945, addressed by you to Pierce & Greer, I want to direct your attention to this portion of it, and this has to do with the franchise taxes due the State of Delaware.

Do you have some recollection of that problem?

A. I have.

Q. Was it a constantly recurring one?

(Testimony of Michael J. Curry.)

A. Yes, yes, it was.

Q. The point I have in mind is this, and this is your letter:

“The question I have in mind is whether we should pay these taxes or let them go by default. If we default and our charter is voided, the question arises what would be the effect on the consolidated income and excess profits tax returns filed by the corporation as parent for the years 1942, 1943 and 1944 (to May 1),”

which is struck out on the copy——

The Witness: Yes.

Mr. Clark: “As you know, a very large deduction was taken [373] in 1943 which wipes out any tax liability for that year and will also have an effect on the 1942 and 1944 consolidated returns. I understand the total tax savings to the Western Pacific Railroad Company will amount to about \$15,000,000. Therefore I feel the payment or non-payment of these franchise taxes must be determined particularly from the federal income tax angle. I would suggest that before arriving at a decision in this matter you confer with the firm of Whitman, Ransom, Coulson and Goetz, our tax counsel, who are aware of the situation and are considering the consequences which the non-payment of these franchise taxes would have from an income tax viewpoint.” [374]

Q. Now having had that language read to you from your letter, Mr. Curry, as of February 21, 1945, can you tell us what was in your mind at

(Testimony of Michael J. Curry.)

that time with respect to any connection between the continuance of the charter of the holding company and the tax situation of the railroad company?

Mr. MacKinnon: That is a mischaracterization. It wasn't a tax situation of the railroad, it was the affiliated group. I don't think you can expect them to answer that.

The Court: Yes, I can't see how you can expect him to answer that question anyway.

Q. (By Mr. Clark): What did you have in mind, Mr. Curry, in writing the language which I have read to you?

A. Let me say that this paragraph here, referring to——

The Court: Isn't it self-explanatory?

Mr. Clark: Well, I don't know that it is, your Honor.

The Court: Well, it is clear to me what he wrote. Maybe he meant something else; do you want him to develop that he meant something differently in that regard?

Mr. Clark: No, I don't your honor. This witness—perhaps the situation we are laboring under is that we have taken depositions in this case, and we know the answers that have been given on other occasions, and I simply want this witness' answer concerning what he meant when he used that language. It may develop someone else wrote the letter, your Honor.

(Testimony of Michael J. Curry.)

The Court: Well, if that is what you want to bring out you [375] may ask him.

The Witness: I was just about to state that this reference here to the taxes and so forth, I got help from Miss Valouch on those paragraphs, and we had in mind the continuance of the charter for tax purposes.

Q. (By Mr. Clark): And for whose tax purposes?

A. The consolidated return, the corporation and its affiliates.

Q. For whose tax saving?

The Court: Well, doesn't that speak for itself?

Mr. Clark: I think it does. [376]

* * *

MICHAEL J. CURRY

Direct Examination by Interveners

(Resumed)

By Mr. Clark:

Q. Now, Mr. Curry, at the close of yesterday afternoon's session you were being examined with respect to a letter dated February 21, 1945, addressed by you to Messrs. Pierce & Greer, attention F. C. Nicodemus, Jr., copy to James K. Polk, of Whitman, Ransom, Coulson & Goetz; which letter was received in evidence in this case as Interveners' No. 5. You will remember that that had to do with certain franchise taxes owing by the holding corporation to the State of Delaware.

(Testimony of Michael J. Curry.)

A. Yes.

Q. Now, let me show you a copy of the telegram which has been received in evidence in this case as Plaintiff's Exhibit 45, from you to Mr. Coulson at the Mark Hopkins Hotel, dated March 26, 1945 (handing to witness). A. Yes, sir.

Q. Now, does that telegram refer to the franchise taxes which you discuss in Interveners' Exhibit No. 5? A. Yes. [382]

Q. Now, what was the occasion for your sending this telegram, Plaintiff's Exhibit 45, to Mr. Coulson at the Mark Hopkins Hotel in San Francisco?

A. He requested that I notify him there as to the decision of the Tax Board.

Q. Now, were those taxes as reduced ultimately paid? A. Yes, they were.

Q. And from what source did the holding corporation get the money to pay them?

Mr. MacKinnon: I submit, your Honor, that is not the best evidence. Payment ought to be demonstrated by the documents themselves, rather than relying on the recollection of the witness.

Mr. Clark: I am relying on the witness' recollection, your Honor.

The Court: The witness may know. I will overrule the objection.

A. Well, I am not sure whether it was for those years or not that we borrowed money from the A. C.—

(Testimony of Michael J. Curry.)

Mr. MacKinnon: Your Honor, I object to that on the ground it is not responsive.

Mr. Clark: All right. Just a moment.

Q. Let me direct your attention, Mr. Curry, to some minutes of the board of directors of the holding corporation held on Tuesday, July 31, 1945, being Plaintiff's Exhibit 46. I direct [383] your attention particularly to page 27 of the minute book, the second paragraph from the bottom, and after having refreshed your recollection with those minutes, would you tell us from what source the monies were obtained with which the franchise taxes mentioned in Interveners' Exhibit 5 were paid (handing to witness)?

A. The money was borrowed from the A. C. James Company.

Mr. Clark: Thank you.

Now, may it please your Honor, we will now offer in evidence as Interveners' Exhibit 6 a copy of a letter dated May 31, 1944, addressed to Mr. F. C. Nicodemus, Jr., 40 Wall Street, New York, signed by M. J. Curry, together with a penciled notation on it.

(The letter referred to was received in evidence and marked Interveners' Exhibit 6.)

Mr. Clark: This letter reads as follows, your Honor:

"Dear Mr. Nicodemus:

As you know, (see copies of our letters dated

(Testimony of Michael J. Curry.)

March 21, 1944, State of Delaware, Office of Attorney General; and March 31, 1944, to Corporation Trust Company, Wilmington, Delaware) the State Tax Board granted extension to July 1, '44, for payment of the corporation's 1941 franchise tax, which as of July 1, 1944, will amount to \$1262.50 principal plus penalty interest of 4% from July 1, 1942, [384] amounting to \$101; a total of \$1363.50.

In view of the conditions surrounding the corporation at this time, I should like to have your opinion as to what should be done in the matter of payment or nonpayment of the tax. If not paid on or before July 1, 1944, its charter will be voided.

Yours very truly,

M. J. CURRY."

Mr. MacKinnon: Mr. Clark, the offer includes the notation?

Mr. Clark: I have already stated that, Mr. MacKinnon. I am only interested in the part I read to his Honor.

We will next offer as Interveners' 7 the reply to the last exhibit, being an original letter addressed to Mr. M. J. Curry as President, the Western Pacific Railroad Corporation, 37 Wall Street, New York, signed F. C. Nicodemus, Jr., which letter is marked on the deposition as Interveners' Exhibit 229, the letter being dated June 14, 1944.

(The letter referred to was received in evidence and marked Interveners' Exhibit 7.)

(Testimony of Michael J. Curry.)

Mr. Clark: This letter reads as follows, your Honor: This is from Mr. Nicodemus.

“Dear Mr. Curry:

As I mentioned to you yesterday, I talked with Colonel Coulson about the compromise proposal respecting the Delaware franchise tax, involving the total payment as of July 1, 1944, of the sum of \$1363.50. In the course of this talk I explained to Colonel Coulson that it would be necessary to make this payment in order to continue the corporate existence of the company through the current calendar year and that I did not see how we could avoid making this payment out of current available cash.

I told him that I felt quite sure, and he agreed, that Mr. Buckland would recognize the necessity of this payment, should he ultimately succeed in maintaining his claim of a lien on our cash derived from the Standard Realty and Development Company, notwithstanding the fact that his own claim has been satisfied and he has been made whole under the Commission's plan of reorganization. You may therefore arrange for the payment referred to in your letter to me of May 31, 1944.

Yours very truly,

F. C. NICODEMUS, JR.”

(Testimony of Michael J. Curry.)

And we also offer the pencil notations on this exhibit.

We will next offer in evidence as Interveners' Exhibit 8 a copy of letter dated March 27, 1943, addressed to the State [386] of Delaware, State Tax Department, 843 King Street, Wilmington, Delaware, and signed M. J. Curry, blind copy, B.C.C., to Mr. F. C. Nicodemus, Jr., together with the pencil notation in green pencil on the second page of this letter.

Mr. MacKinnon: What prior identification?

Mr. Clark: I have stated the date.

Mr. MacKinnon: Did it have an exhibit number on it?

Mr. Clark: I am sorry. Yes. This letter was marked on the deposition as Railroad Company's Exhibit 415.

(The letter referred to was received in evidence and marked Interveners' Exhibit 8.)

* * *

Q. Now, Mr. Curry, at the time you signed the consolidated returns for 1943, which the record shows was on July 15, 1944, did you know that the Coulson firm represented the A. C. James Company in the reorganization?

(Testimony of Michael J. Curry.)

A. I did not definitely, no.

Mr. Clark: Is Mr. Curry's deposition here?

The Clerk: Yes, it is, counsel.

Mr. Clark: May I have it?

Page 2788. Commencing on page 2787, your Honor.

Mr. Curry, I will read the following questions and answers from page 2787 of your deposition:

“Q. Do you know whether or not that firm (referring to Whitman, Ransom, Coulson & Goetz) represented the James Foundation?

“Mr. Shaw: I will object to that. There is no foundation laid that the James Foundation was in the reorganization proceeding.

“The Witness: The question again, please?

“Mr. Clark: I will reframe it.

“Q. Did you have any understanding at that time with respect to whether or not the firm of Whitman, Ransom, Coulson & Goetz represented the James interests? A. I did not.

(Testimony of Michael J. Curry.)

“Q. You knew nothing about that at all?

“A. Of my own knowledge, that is right.

“Q. What was your understanding in that regard, if anything?

“A. It was my understanding they did.

“Q. Did you have that understanding throughout this period we have been discussing commencing on March 15, 1943? A. Yes.”

Do you remember giving that testimony on deposition? A. Yes, I remember.

Q. Are those answers correct? A. Yes.

Mr. Clark: The connection with Plaintiff's Exhibit 66, which is already in evidence and is a letter having to do with the files in the possession of Mr. Curry in December, 1946, we will offer letter dated December 11, 1946, addressed to Allan P. Matthew, Balfour Building, San Francisco, on the letterhead of Whitman, Ransom, Coulson & Goetz, signed Robert E. Coulson, and which is also identified as Interveners' Exhibit 207 on the deposition.

(The letter referred to was received in evidence and [393] marked Interveners' Exhibit 9.)

Mr. Clark: This letter, may it please your Honor, is dated at a time after both the VanKirk and the present litigation had been filed for these tax savings, and while Mr. Coulson's firm was still joint tax counsel for both the plaintiff corporation and the defendant company, and I am reading

(Testimony of Michael J. Curry.)

from the last paragraph in this letter, Interveners' Exhibit 9.

"Naturally my interest in the question discussed in this letter," being the files and the redistribution of them which had been suggested, "Naturally my interest in the question discussed in this letter is solely in protecting the operating company in connection with the VanKirk litigation here in New York of which we have partial counterparts in the actions brought by the holding company in California. In this connection we have received copies of your answers in the California tax action of the holding company, and I have also talked with Mr. Polk about his discussions with your office."

Mr. Adams: Mr. Clark, you will state for the record the portions you have just read, containing a reference to "your answers in the California transaction" refer to the answers which we filed in behalf of the railroad company, defendants in this action? [394]

Mr. Clark: Oh, yes. I think the letter clearly shows that.

Lastly, your Honor, we will offer as Interveners' exhibit next in order, being Interveners' 10, and in connection with the letter already received as Plaintiff's Exhibit 72, a copy of a letter dated February 11, 1947, addressed to James K. Polk, Esq., Carlton Hotel, Washington, D. C., signed with a stamp reading "Original signed Charles Elsey," it having been

(Testimony of Michael J. Curry.)

previously identified on deposition as Railroad Company Exhibit 938. This letter, may it please your Honor, is the railroad file copy of the original letter, which is already in evidence as Plaintiff's Exhibit 72, and I am offering it for only a limited purpose.

(The copy of letter referred to was received in evidence and marked Interveners' Exhibit 10.) [395]

* * *

Cross-Examination

By Mr. Adams:

Q. Mr. Curry, when did you first enter the railroad company business?

A. Around 1898, I believe.

Q. And from that time until your retirement in 1945, were you always engaged in the railroad business? A. That's right.

Q. Now in addition to being vice-president, assistant secretary and assistant treasurer at the Western Pacific Railroad Company, it is a fact, is it not, that you were also a director and a member of the Executive Committee of the Western Pacific Railroad Company? A. That's correct.

Q. And those offices you held from May 6, 1940, until November 20, 1944? I am referring to the offices of director and as a [396] member of the Executive Committee? A. That's correct.

Q. So that you retired from those two offices

(Testimony of Michael J. Curry.)

prior to the time when the railroad properties were returned by the trustees to the reorganized company?

A. I don't quite understand. I retired from what positions?

Q. Those of director and member of the Executive Committee.

A. Of the railroad company?

Q. Yes. A. That's correct.

Q. Were you also a director of the Railway Express Agency as an alternate for Mr. Schumacher?

A. That's correct.

Q. And were you also a director of the Denver, Salt Lake & Rio Grande Junction Railroad?

A. Yes.

Q. Now from 1927 to 1942, Mr. Curry, that period of time during which you, in the New York office, were an officer both of the railroad company and the railroad corporation, was your combined salary for those two companies \$9,900 a year?

A. I think that is correct. I can't remember back that far, just what the salaries were. They could change from time to time.

Q. We have an exhibit in the record showing, I believe, that your salary, combined salaries for the two companies in the [397] year 1938 was \$9,900 a year. Would that be in accordance with your recollection?

A. That is in accordance with my recollection, yes.

(Testimony of Michael J. Curry.)

Q. Did you also receive compensation as an officer of the Denver & Rio Grande Western?

A. I did.

Q. And was that approximately a thousand dollars a year?

A. Yes, it started out at \$900 and I think it reached a thousand.

Q. Now after you became President of the Western Pacific Railroad Corporation, was your combined salary from the company and the corporation \$11,700 a year?

A. That is my recollection, yes.

Mr. Adams: And may I ask, Mr. Clerk, that there be handed to Mr. Curry Plaintiff's Exhibit 20-B, the 1943 Annual Report? It is a printed document, one of those annual reports.

The Court: That is the 1943 report?

Mr. Adams: Yes, your Honor. It is the report for the year 1943. You might hand it to him, if you please, if that is convenient to you, Mr. Elkington.

The Clerk: That is all right.

Mr. Adams: Mr. Curry, if you will turn over to the page close to the beginning, where the list of directors and officers is printed?

A. Yes, sir. [398]

Q. Do you find that? A. I have it.

Q. What page is it, just for the record?

A. It is page 1.

Q. Now directing your attention to the names of the officers of the railroad company which appear

(Testimony of Michael J. Curry.)

on that page, does Mr. Schumacher's name appear first? A. It does.

Q. And Mr. Elsey's appears second?

A. Yes.

Q. And your own third? A. Yes.

Q. And were you at that time the third ranking officer in the Western Pacific organization?

A. I wouldn't say that, no.

Q. And the names of what officers appearing below your own, Mr. Curry, would you say were ranked before you?

A. Why, I believe Mason, the Vice President and General Manager and Poulterer, the Vice President in charge of traffic, and the Chief Engineer, were more important officers than I was.

Q. Do you know whether or not their compensation was greater than yours?

A. I do not at the moment, no.

Q. It is the fact, is it not, that you gave instructions from [399] time to time to Mr. DeGraff, the General Auditor? A. Yes.

Q. Tank you, Mr. Curry. That is all about that exhibit.

Do you recall, Mr. Curry, yesterday when Mr. Phleger asked you about the occasion when you signed the power of attorney in behalf of the plaintiff corporation to Mr. Polk, Mr. Noneman and Mr. Cavanaugh? A. I recall it, yes.

Q. That was in late June of 1946?

A. That's correct.

(Testimony of Michael J. Curry.)

Q. And you recall that Mr. Phleger asked you whether you consulted with anyone prior to signing the power of attorney? A. Yes.

Q. Now do you remember that Mr. Clark asked you about that at the time that your deposition was taken in New York last March?

A. Yes, I recall that.

Q. And I would like to refer to the testimony which you gave at that time, when your deposition was taken, and ask you some questions about that. I will refer to page 2929 of the transcript of your deposition and perhaps Mr. Curry might have a copy in front of him.

(Handed to witness by the Clerk.)

The Witness: What is the page number?

Q. (By Mr. Adams): 2929, beginning, Mr. Curry, five lines [400] from the bottom of the page (reading):

“Q. (By Mr. Clark):

“Q. Prior to signing the original power of attorney of June 26, 1946, on that date, did you take up the matter of your signing a power of attorney for the corporation with any of its officers or directors?

“A. I do not recall that I did.

“Q. Did you discuss it with anyone whomsoever other than Miss Valouch? A. No.

“Q. Did you ask Miss Valouch or anyone else whether you, as president, had the authority to sign such a power of attorney?

(Testimony of Michael J. Curry.)

“A. On second thought, my recollection is that I phoned Mr. Nicodemus, corporation counsel, and told him that this power of attorney was before me and asked if it was all right to execute it. That is my recollection.

“Q. What is your recollection concerning what Mr. Nicodemus replied to your inquiry?

“A. That it was o.k. to do it. And then I placed my signature on it.

“Q. Did you tell Mr. Nicodemus during that telephone conversation the reason or necessity for your being requested by Miss Valouch to sign this power of attorney? [401]

“A. I do not recall whether I did or not.

“Q. Didn't Mr. Nicodemus ask you why it was necessary for the corporation to give a power of attorney at that time?

“A. I do not remember the conversation at all, sir.

“Q. Do you remember whether or not such a conversation ever took place?

“A. I have said that it was my recollection that I called Mr. Nicodemus and told him about it.

“Q. Is it your recollection that this conversation with Mr. Nicodemus took place on or about June 16, 1946, and prior to the time you signed the original instrument?

“A. That is my recollection.”

Do you remember being asked those questions and giving those answers? A. I do.

(Testimony of Michael J. Curry.)

Q. And were they true at the time you gave them?

A. At that time that was my recollection.

Q. And at the time you gave that testimony, you believed it to be true?

A. According to my recollection, yes.

Q. Well, I take it, Mr. Curry, that at the time you gave those answers, you believed them to be true, did you not? A. Oh, yes. [402]

Q. And thereafter, Mr. Curry, after you had completed giving your testimony upon the taking of your deposition, did you read this carefully?

A. I did.

Q. You made a number of corrections in it, did you not? A. I did.

Q. And you read this portion, did you not?

A. I did.

Q. And you made no corrections in that portion?

A. I don't recall that I did.

Q. You have before you the original document, which would show all your corrections, if you will look at it? I think you will see that that is so.

A. Well, there is no correction on this testimony that we have read.

Q. Right. Now at the time you read your deposition and corrected it, you examined it carefully, did you not? A. I did.

Q. And at the time you signed it, did you believe that the testimony I just read to you was true?

A. Yes.

(Testimony of Michael J. Curry.)

Q. Now yesterday, while Mr. Phleger was asking you questions about this same occasion, the following questions were asked and the following answers were given, given at the bottom of page 325 of the transcript of the testimony in this case. May [403] the witness have a copy?

The Court: I will give him a copy. (Handing copy of transcript to the witness.)

Q. (By Mr. Adams): Beginning at the bottom of page 325, Mr. Curry, (reading)

“Q. I now show you, Mr. Curry, Plaintiff’s Exhibit 65, a power of attorney of the Western Pacific Railroad Corporation dated June 26, 1946, running to James K. Polk and others. Do you recall having executed the original of that power of attorney?

“A. I do.

“Q. At whose instance did you sign it?

“A. It was brought to me in my office at 40 Wall Street, Whitman and Ransom, 52nd floor, by Miss Valouch, who is on the same floor, and she stated that Mr. Polk desired that this power of attorney be executed, and I signed it.

“Q. Where were you when you signed it?

“At 40 Wall Street in the suite of Whitman, Ransom, Coulson and Goetz.

“Q. Did you consult any of the directors or any officer of the corporation before you executed that power of attorney as to whether or not you should sign it?

“A. I did not, as I depended entirely on our tax counsel for putting those things before us.

(Testimony of Michael J. Curry.)

“Mr. MacKinnon: I move to strike out everything after ‘I did not’ as not responsive. [404]

“Mr. Phleger: It may go out as far as I am concerned.

“The Court: It may go out.

“Q. (By Mr. Phleger): Did you consult with anyone prior to signing that power of attorney?

“A. Not to my knowledge.”

And you recall answering those questions that way yesterday under your examination by Mr. Phleger? A. I do.

Q. And at the time you gave that testimony, did you believe it to be true? A. I did.

Q. Now at the time you gave that testimony yesterday, Mr. Curry, did you have in mind the testimony you had given upon the taking of your deposition which I have already read to you?

A. Yes, I had that in mind, and I recalled that I was under the impression I talked to Mr. Nicodemus about it, but since that deposition was taken, I have thought a lot about it and I have looked through my files to see if there was a memo, and I am satisfied that I did not talk to Mr. Nicodemus about it.

Q. Was the last answer you were satisfied you didn't talk to him about it? A. Yes.

Q. And what is it that has satisfied you that you didn't talk to him, since you gave your testimony at the time of the deposition [405] that your best recollection was that you did?

(Testimony of Michael J. Curry.)

A. Well, I have thought a great deal about it, and as I say, I have no memo in my files indicating that I did ask Mr. Nicodemus whether or not I signed it, and I seem convinced that I did not discuss it with Mr. Nicodemus.

Q. Is it your thought that your recollection at this time is better than it was a year ago on the subject?

A. I think so, yes, sir. I have had more time to reflect on those things, and that is the way I feel about it now.

Q. You have discussed this subject, I take it, with other gentlemen on your side of the case?

A. Yes.

Q. This particular subject?

A. I have talked to my lawyers about various things in connection with my testimony.

Q. And you have discussed this particular occasion, have you not? That is to say, the occasion on which you signed the power of attorney?

A. I don't recall that I did specifically discuss that matter.

Q. Have you discussed with them at all the question of whether or not you telephoned or got in touch with Mr. Nicodemus to ask his advice prior to signing the power of attorney?

A. I don't recall that I discussed that question with him.

Q. Pardon me, go ahead. I shouldn't interrupt you. [406]

(Testimony of Michael J. Curry.)

A. There is nothing further for me to say.

Mr. Adams: Would you read Mr. Curry's answer, the last answer? I want to be sure he has full opportunity to complete any statement.

(Previous answer read.)

Q. (By Mr. Adams): And is it your best recollection, Mr. Curry, at this time that at no time since giving your testimony upon the taking of the deposition, have you discussed with anybody, any lawyer on your side of the case the question of whether or not you did telephone to Mr. Nicodemus before you signed the power of attorney?

A. It is my best recollection I haven't discussed it with anybody.

Q. And what is it, then, that has occasioned your coming to the conclusion at this time that the testimony which you gave upon the taking of your deposition was erroneous?

A. Well, as I have stated, reflecting on my testimony at that time, after it was given, it occurred to me that after thinking over the matter pretty thoroughly, I had no recollection of talking to Nicodemus about it, and I have convinced myself that that was the situation.

Q. At the time you gave your testimony, you did have such a recollection?

A. I did at that time, yes. [407]

* * *

Q. (By Mr. Adams): Mr. Curry, do you recall

(Testimony of Michael J. Curry.)

yesterday in answer to a question put to you by Mr. Phleger with regard to bookkeeping the question that he put and the answer that you gave in that regard? A. I do.

Q. If I may, I will read it to you, from page 321 of the transcript of yesterday's testimony, line 25:

“Q. Did you ever make any entries upon books?

“A. I never put pen or pencil to any book of the corporation. I depended entirely on the employee who was delegated that work.”

A. I remember that, yes.

Q. You recall that testimony. Do you recall the giving of your deposition in New York last March, when I asked you some questions, when I was questioning you, with regard to a journal entry which you yourself prepared reflecting the transfer of the stock of the railroad company to the reorganization committee?

A. I recall that. That was a memorandum, not a bookkeeping entry.

Q. I would like to direct your attention to the testimony that [408] you gave in that connection on page 3,411 of the transcript of your testimony taken at that time.

Mr. Adams: At this time, and in connection with this third question, I will offer as railroad defendant's exhibit 1, in this case a single sheet of handwriting previously identified as Railroad Co. defendant's exhibit 385, and Railroad defendant's 2, in this

(Testimony of Michael J. Curry.)

case, a single sheet of typewriting with some endorsements upon it previously identified as Railroad Defendant's Exhibit 386.

Mr. Phleger: Excuse me for interrupting. Those Journal entries have to do with some material that is covered by one of our exhibits, do they not?

Mr. Adams: That is right. Plaintiff's Exhibit 44, previously offered, and particularly the page identified as Interveners' 36K of Plaintiff's Exhibit 44.

Mr. Phleger: Is it the same sheet?

Mr. Adams: No, not at all. This page of the plaintiff's exhibit, your Honor, is a copy of an actual entry and the documents I am offering are documents that were prepared prior to the making of the actual entry.

If it may be understood that as the "Defendant's Exhibits" are offered by me, we will save putting "Railroad" in front of that word.

(The documents referred to were thereupon received in evidence and marked respectively Defendant's Exhibits 1 and 2.) [409]

Mr. Adams: Mr. Curry, you have in your hands Defendant's Exhibits 1 and 2 just offered in evidence? A. I have.

Q. Would you please state to the Court what Defendant's Exhibit 1 is?

A. It is a handwritten memo by me with reference to the record of transfer of the ownership of the capital stock to the reorganization committee

(Testimony of Michael J. Curry.)

under the plan of reorganization of the Western Pacific Railroad Company, pursuant to order of the Federal District Court for the Northern District of California, dated December 17, 1943; and also under and pursuant to an agreement dated November 22, 1943, between the Western Pacific Railroad Corporation, its secured creditors, and said reorganization committee, and approval of the stockholders of the Western Pacific Railroad Corporation given at special meeting held April 20, 1944. That is the typewritten statement, with the corrections in pencil made by me.

Q. The typewritten statement is identified for the record as Defendant's Exhibit No. 2. Would you please state to the Court what the pencil record, Defendant's Exhibit No. 1, is?

A. It is a repetition of just what I have read from the typed memo and I, to make sure that the corrections made on this typewritten copy were incorporated, wrote it out for the purpose.

Q. Did you prepare those papers, and particularly Defendant's No. 1, your handwritten copy, for the purpose of preparing an [410] entry to be made upon the journal of the corporation?

Mr. Clarke: I object to that, your Honor, on the ground it assumes something not in evidence. Counsel will note that the evidence in this case shows that the typed memorandum was prepared by Miss Valouch. The question asked assumes the witness prepared both of them.

(Testimony of Michael J. Curry.)

The Witness: I did not. This was merely a re-write of the memorandum.

Mr. Clark: Prepared by Miss Valouch.

Q. Is that correct?

A. That memorandum was prepared by Miss Valouch and placed before me.

Mr. Adams: If your Honor please, addressing my remarks to the Court, if counsel has objections to my questions, may I request that the objections be stated to the Court and that my examination be not interrupted?

The Court: Yes.

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's No. 2, the typewritten document, is it your recollection that that was prepared by Miss Valouch? A. Yes.

Q. And is it your recollection that you made the corrections upon it, that appear upon it?

A. Yes.

Q. And is it your recollection further, then, that you then [411] wrote the handwritten copy to have a single clear, uncorrected copy of that proposed journal entry? A. That is correct.

Q. Did you do this for the purpose of making up the entry that was to be entered in the journal of the corporation?

A. I did not. I did make the corrections, as I felt it would clarify the statement. That is all.

Q. What was your purpose in making the corrections?

(Testimony of Michael J. Curry.)

A. My purpose was to clarify the statement.

Q. You knew, did you not, that the statement was one prepared for entry in the journal of the plaintiff corporation? A. Yes.

Q. And you corrected it so that it would be a correct entry?

A. Well, not a correct entry, so far as the entry itself was concerned. I corrected it in certain places there that I felt would more nearly express what was intended.

Q. And be a more accurate statement?

A. That is how I felt about it at the time, yes; but I had nothing to do with preparing this memorandum originally.

Q. What you had to do with it, I take it, is what you testified to? A. Just the corrections.

Q. That you corrected it? A. Yes.

Q. Before the time it was entered? [42]

A. Before?

Q. Yes.

A. Before it was entered on the books.

Mr. Adams: May the record show, by stipulation of counsel, that the actual entry shown at the page marked Interveners' 36K of Plaintiff's 44 conforms precisely to the corrected documents, Defendant's Exhibit 1?

Mr. Clark: I think that is true, but the documents will speak for themselves. They are all in evidence, your Honor. I think that is the fact from recollection.

(Testimony of Michael J. Curry.)

Mr. Phleger: I put them in and I will accept counsel's assurance that they are the same.

Q. (By Mr. Adams): Mr. Curry, is it a fact that the bookkeepers and accountants in the New York office were under your supervision and direction as treasurer of the parent corporation?

A. Yes, that is correct.

Q. And that was so during the entire period from 1927 to the end of 1944? A. That is right.

Q. I have no further use for the papers, if you wish to hand them back to the Clerk.

Now, during the period 1927 to 1942, Mr. Curry, was Mr. Schumacher the chief executive officer of the Western Pacific Railroad Corporation?

A. He was. [413]

Q. During that same period did he also occupy the office of Chairman of the Executive Committee of the Western Pacific Railroad Company?

A. He did.

Q. During the period of 1935 to the end of 1944, that is, from November 9, 1935 to the end of 1944, isn't it a fact that Mr. Schumacher was also one of the trustees in the reorganization proceedings of the Western Pacific Railroad Company?

A. He was.

Q. Did he during all that time maintain his office in the joint New York office at No. 37 Wall Street?

A. He did.

Q. During all of that time were you his right-hand man in the New York office?

(Testimony of Michael J. Curry.)

A. What do you mean by righthand man?

Q. Proceed, Mr. Curry. Go ahead.

A. Why, he relied upon me to carry out certain details, and so forth, and to check his papers as they came in and out of my room. He used to throw them over to me to note and check and see if everything and everybody was notified, and so forth, that was my job.

Q. Would you say it is true you were second in command of the New York office during that period?

A. Yes.

Q. Is it correct? [414]

A. That is correct. I was next to Mr. Schumacher and he looked upon me as his chief clerk or his office manager and he handed things to me.

* * *

Q. (By Mr. Adams): Mr. Curry, during that period—I am speaking of the period 1927 to 1942—were you in constant touch with Mr. Schumacher?

A. Yes.

Q. What were your duties?

A. Well, supervision of the office personnel and the carrying out any directions or instructions from Mr. Schumacher or Mr. Elsey of the railroad company. That is about all I did, was to carry out the orders of my superiors.

Q. Was it your responsibility to bring to Mr. Schumacher's attention problems which in your judgment required his decision?

A. Was it my duty——

(Testimony of Michael J. Curry.)

Mr. Adams: Will you read the question? [415]

(Question read.)

A. Yes.

Q. (By Mr. Adams): Did this require you to become familiar in general with the problems within the New York office? A. Generally, yes.

Q. Was this office the head office of the Western Pacific group during that period? A. It was.

Q. Would it be fair to say that you were in general familiar with the problems of the Western Pacific group?

A. Well, not entirely. Mr. Schumacher was Executive officer of the railroad company and of the corporation, and I think I rather looked upon him as being the responsible party for all companies.

Mr. Adams: Mr. Reporter, will you read the question?

(Question read.)

Q. (By Mr. Adams): Do you have in mind any problems with which you were unfamiliar?

A. Which question do you want me to answer first?

Q. The last one I just put to you.

Q. What was that?

(The last question was read by the reporter.)

A. No.

Q. (By Mr. Adams): Who signed the correspondence that went out of the New York office?

(Testimony of Michael J. Curry.)

A. For both companies?

Q. Yes.

A. Well, Mr. Schumacher signed the railroad company letters, and as president of the corporation, anything that was sent out on a corporation matter he signed.

Q. Did you sign any part of the correspondence?

A. Yes, I had correspondence with the general auditor that I signed in behalf of the railroad company, and as treasurer of the corporation I also signed certain letters in the corporation's behalf.

Mr. Clark: May it please the Court, may I ask if this is limited to the period prior to February, 1942?

Mr. Adams: We have been speaking of that time, have we not, Mr. Curry?

The Witness: Yes, sir, as I understand it, from 1927 to 1942.

Q. (By Mr. Adams): Was there any difference as regards the railroad company after you became president of the parent corporation with regard to this matter of signing correspondence?

A. No, that continued right along.

The Court: I should like to ask a question. If I am out of order, you can correct me. Is it in evidence what was the compensation that Mr. Schumacher got as head of the companies?

Mr. Adams: I do not think it is in evidence, your Honor, and I will ask Mr. Curry that question.

Q. Mr. Curry, it is the fact, is it not, that Mr.

(Testimony of Michael J. Curry.)

Schumacher received as trustee in reorganization an annual salary of \$15,000?

A. That is correct.

Q. Do you recall the salary he received as president of the corporation during the period 1927 to 1942, when he resigned as president?

A. To my recollection, he was receiving \$15,000 per annum.

Q. From that source?

A. From the corporation.

Q. And after he resigned as president, then is it the fact that he did not receive any further compensation from the corporation?

A. That is correct.

Q. Prior to the time when the railroad company went into reorganization, do you have any recollection of what his salaries were at that time from these two sources?

A. Well, it is my recollection he was getting \$30,000 from each for a time.

The Court: That would be up to 1935?

A. Well, I can't say up to what year.

The Court: That was the year of the reorganization.

Mr. Adams: That was when the reorganization proceedings began.

The Court: Go ahead. [418]

Q. (By Mr. Adams): Is it the fact that during the period of reorganization Mr. Schumacher was also receiving compensation from the Denver & Rio

(Testimony of Michael J. Curry.)

Grande for his financial responsibilities and employment in that connection?

A. My recollection is that at the time the Denver & Rio Grande went into bankruptcy and his salary was cut off.

Q. Now, we were talking about correspondence out of the New York office which you signed. Did other employees from the office prepare correspondence for your signature? A. Yes, sir.

Q. Was there any other officer or employee in the New York office besides Mr. Schumacher and yourself who was authorized to sign correspondence?

A. No, sir.

Q. It was either Mr. Schumacher or you?

A. Yes, sir.

Q. Did you prepare letters for Mr. Schumacher's signature?

A. Very rarely. He usually dictated his own letters.

Q. To his own secretary?

A. To his own secretary.

Q. Would you please describe in a general way what problems were handled in the New York office during the period 1927 to 1942?

A. Well, it was known as the fiscal office, the executive or fiscal office of the railroad company, and any matters, any [419] problems that came up that the New York office could take care of were referred to the New York office for handling.

Q. Were certain traffic problems also handled through the New York office?

(Testimony of Michael J. Curry.)

A. Yes, but not generally. Mr. Schumacher did not interfere with the operation of the traffic department of the railroad company. He looked to his vice president in charge of traffic to take care of that. Once in a while he would get into some little conversation about it, but I don't think he directed it at all.

Q. Were problems relating to the obtaining of credits in the Reconstruction Finance Corporation handled through the New York office?

A. They were handled by Mr. Schumacher, yes, sir.

Q. And you were familiar with that?

A. I was familiar with that, yes.

Q. And did the New York office also handle problems relating to the purchase of equipment for the railroad?

A. Yes, Mr. Schumacher had considerable to do with the purchase of equipment for the railroad company.

Q. And you were familiar with that?

A. Generally, yes.

Q. And was the matter of the annual budget for the railroad also dealt with in the New York office?

A. Yes, it was submitted to Mr. Schumacher for approval each year.

Q. And you were familiar in a general way with the annual [420] budget?

A. In a general way, but I had nothing to do

(Testimony of Michael J. Curry.)

with the makeup of the budget at all. He was the one that examined it and approved it.

Q. He also took it up, did he not, with the principal creditors, including RFC and the institutional bondholders?

A. Yes, he handled all those matters himself.

Q. So would you say it was a fair statement that the New York office dealt with all the major questions relating to the Western Pacific?

A. Yes, I would.

Q. Now, did you, as secretary of the plaintiff corporation, perform all the functions of that office as defined in the by-laws?

A. Yes, as faithfully as possible.

Q. And did you, as treasurer of the corporation, perform all the functions as defined in the by-laws?

A. I did.

Q. And you are familiar with the duties prescribed in the by-laws for each of those offices?

A. Yes, sir.

Q. As an assistant secretary and assistant treasurer of the railroad company, did you perform the functions of those offices?

A. Yes, but they were no definite functions. Under the [421] by-laws, as I stated I think a day or two ago, the board could appoint one or more vice presidents, and they would be delegated certain duties or authorized to sign papers. That was about what I was, a signing officer.

Q. You are speaking now of your office as assis-

(Testimony of Michael J. Curry.)

tant secretary and assistant treasurer of the railroad company? A. Yes, sir.

Q. Now, is it the fact, Mr. Curry, that you were responsible for all the funds and expenditures of the New York office?

A. Yes, all the funds received and disbursed were under my supervision.

Q. And it was your responsibility to see that the accounts were well kept and to authorize the expenditures? A. Yes.

Q. Now, is it the fact, Mr. Curry, that Mr. Schumacher's resignation as president of the plaintiff corporation was occasioned by the corporation's financial distress? A. Yes.

Q. When you became president, did you feel that in general you were familiar with the corporation's problems?

A. I didn't feel entirely at ease about it, but as Mr. Schumacher said, there was nothing facing us but liquidation and dissolution, and he felt I could carry through that period.

Q. Yes. Now, you told us something a little different from what I asked you. [422]

Mr. Adams: Will you read the question, please?

(Question read.)

A. Yes.

Q. (By Mr. Adams): As the president of the corporation, have you attempted to the best of your ability to discharge the duties of that office?

A. I have.

(Testimony of Michael J. Curry.)

Q. Have you attempted to the best of your ability to protect the interests of the stockholders of the plaintiff corporation? A. I have.

Q. When did you become a director of the corporation? A. I think it was in 1927.

Q. And you have ever since been a director of the corporation? A. Yes, sir.

Q. As a director of the corporation, have you always exercised your best judgment in voting on matters which came before the board?

A. I certainly have, yes, sir.

Q. Did anyone ever tell you how to vote as a director of the corporation? A. No, sir.

Q. Did anyone ever undertake to control your activities as the president of the corporation?

A. No, sir. [423]

Q. Did anyone ever tell you not to vote on any matter coming before the board of directors?

A. No, sir.

Q. Did anyone ever tell you not to bring any matter before the board of directors for its consideration? A. No, sir.

Q. Did anyone ever ask you to stay away from any meeting of the board? A. No, sir.

Q. Did you know Arthur Curtis James?

A. I did.

Q. When did you first meet him?

A. I first met him about the time I came to New York, in 1914.

(Testimony of Michael J. Curry.)

Q. That was before your association with Western Pacific? A. Oh, yes.

Q. That was during the period of your association with the El Paso and Southwestern?

A. That is correct.

Q. And during that period you were assistant to the president of that company? Not during all of it, but for the latter period?

A. During a short period of time.

Q. During the latter part?

A. During the latter part.

Q. When Mr. Schumacher was the president of that company? [424] A. That's right.

Q. Now, how often did you see Mr. James?

A. You mean during all that period?

Q. Yes.

A. Very infrequently. He used to come in to see Mr. Schumacher and I would see him going in and out of Mr. Schumacher's office.

Q. Mr. James' death occurred in June of 1941, did it not? A. That's right.

Q. Did you know Robert E. Coulson?

A. I did.

Q. When did you first meet Mr. Coulson?

A. While he was a director of the corporation, and at the time that I came to New York, I believe; and I have known him since then.

Q. Mr. Coulson resigned as a director at or about the time when you became president of the plaintiff corporation?

(Testimony of Michael J. Curry.)

A. Yes, it is my recollection he resigned early in 1942.

Q. Did you know W. W. Carman?

A. Yes.

Q. And who was Mr. Carman?

A. Well, Mr. Carman was an associate in Mr. James' organization. Just what his position was or his association was, I couldn't describe.

Q. Was it your understanding generally that he was a general and financial secretary to Mr. James? [425]

A. I can't say as to that. I don't know just what his functions were, with him. I understood he was a secretary to Mr. James for a long time.

Q. And when did you first meet Mr. Carman?

A. I met Mr. Carman about the time I came to New York in 1914.

Q. Did you see him frequently?

A. Very infrequently.

Q. And Mr. Carman was also a director of the plaintiff corporation, was he not?

A. He was.

Q. And his resignation was early in 1942, as a director? A. Correct.

Q. And aside from being a director, he was never at any time an officer of the plaintiff corporation?

A. No, Carman never was an officer.

Q. That is likewise true with regard to Mr. Coulson, is it not? A. That is correct.

(Testimony of Michael J. Curry.)

Q. Now, did Mr. James, Mr. Coulson or Mr. Carman ever tell you what you should or should not do as a director of the corporation?

A. They did not.

Q. Did they or any of them at any time ever tell you—strike that. [426]

Did Mr. Coulson or Mr. Carman at any time ever tell you what you should or should not do as president of the corporation? A. They did not.

Q. Did any representative of the James interests ever tell you what you should or should not do as a director? A. No.

Q. Or as the president? A. No.

Q. Do you have any reason to believe that the board of directors of the corporation was ever dominated or controlled by anyone?

A. I have no reason to believe that that was so.

Q. What is your belief in that regard, as to whether or not the board of directors of the corporation was ever dominated or controlled by anyone?

A. It is my belief that it was not dominated by anyone.

Q. Do you have any reason to believe that the officers of the plaintiff corporation were ever dominated or controlled by anyone other than the directions of the board of directors of the corporation?

A. I have no reason to believe that such was done.

Q. Were you, as president and director of the

(Testimony of Michael J. Curry.)

corporation, ever dominated or controlled by anyone? A. I was not. [427]

* * *

Afternoon Session, Friday, February 4, 1949

Direct Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, prior to the time the railroad company went into reorganization in 1935, what was the source of income for the parent company?

A. We had securities of both companies from which we received income.

Q. When you speak of both companies, you mean the Western Pacific and the Denver & Rio Grande? A. I do.

Q. And the income was interest and dividends on those securities? A. Yes, sir.

Q. What was the effect of the Western Pacific and Denver & Rio Grande reorganization on the income of the parent, the plaintiff herein?

A. Beginning in the latter part of '34, our income ceased from those sources, and we gradually used up what we had.

Q. Do you recall writing a series of memoranda to Mr. Schumacher during the years from 1935 to 1938 about the financial problems of the plaintiff corporation? A. Yes.

Q. Do you recall suggesting in those memoranda the advisability [429] of seeking to arrange for the reorganization trustees of the Western Pacific to

(Testimony of Michael J. Curry.)

pay a larger percentage of the expenses of the New York office? A. I do.

Q. And why did you make this suggestion?

A. Because the funds of the company were gradually diminishing to such an extent that it didn't look like we would be able to keep alive.

Mr. Adams: Now at this time, your Honor, I would like to make an offer into evidence as defendant's exhibit 3 of a number of documents following within the description just discussed with the witness. They are Railroad Exhibit's 131 to 138, as identified during the taking of the deposition of Mr. Curry. I would like to make a brief statement about the purpose of this offer, and I hope that these documents may be put in without going to the time of reading them in detail at this time.

These exhibits are memoranda prepared by Mr. Curry to Mr. Schumacher during that period, the first three years of the reorganization, and the offer has a number of purposes: first, one of the purposes is to show Mr. Curry's familiarity with the financial affairs of the Western Pacific, and his competence in dealing with those affairs, his origination of ideas for meeting the corporation's problems, and his understanding of those matters. I might illustrate that by referring to the [430] first of the exhibits, identified as Railroad's 131, and read very briefly from this memorandum of Mr. Curry's, in which he says: (reading).

“We have prepared a statement showing the setup

(Testimony of Michael J. Curry.)

of assets of the corporation, if and when the present proposals for readjustments of the two companies mentioned——”

The Court: When is this, Mr. Adams?

Mr. Adams: Back in 1935. (Continuing.)

“——become effective. There are two statements herewith. One, securities as signable by proposed readjustment of capitalization of the Western Pacific Railroad Company, and the Rio Grande Western Railroad Company, in exchange for existing securities owned, and list of other assets owned remaining unallocated.”

And then Mr. Curry’s correction to change that word to “undisturbed.”

“Second, schedule of securities owned, if proposed readjustment of capitalization of Western Pacific Railroad Company and the Denver & Rio Grande Western Railroad Company is effected.”

I shall not take up your Honor’s time to read much further, but this is indicative of the capacity in dealing with these matters which this current record evidences. Another purpose I have in mind in making this offer is that it does develop the fact that, as early as this time, and I shall show continuously, [431] the plaintiff corporation was progressing in a chronic state of difficulty about funds. It became in greater and greater difficulty, and during this period it went to its creditors to be supplied with the funds to keep it alive and finally it went to the Court’s trustees. In fact, it went to

(Testimony of Michael J. Curry.)

them from time to time about the adjustments. So that another purpose of the offer of this portion of the record is to show that the arrangements for the trustees to pay an additional portion of the expenses of the New York office was undertaken at the suggestion of the plaintiff corporation and for its benefit.

I think I have stated substantially the purposes of this offer and, as I say, I do not want to take the Court's time up to detail the papers, but I make the offer for those purposes.

Mr. Phleger: I might state our position with respect to offers of this kind. I think, first of all, the offer is not within the scope of proper cross-examination of this witness. In the second place, I think the offer is immaterial because, in our view of the case, it does not make any difference what these people knew. But the third objection is this: second purpose stated by counsel is certainly a matter of affirmative defense on their part and has no part in connection with cross-examination. He has stated as second purpose here of showing that these arrangements came about due to the impoverishment of the plaintiff corporation and at its suggestion. I do not think I covered any such matter on direct examination. [432] I would just like to have my position known. We are going to get in such a realm of remoteness here—this is 1935—that we are going to have the 2000 exhibits if you do not look out.

(Testimony of Michael J. Curry.)

The Court: You did develop on direct examination, however, the extent of the activities of the witness on the stand.

Mr. Phleger: That is right. You are quite right.

The Court: Of course, it has not yet been demonstrated to me what the materiality of that phase of the case is.

Mr. Phleger: That is quite right.

The Court: But there were questions asked of the witness concerning the nature and extent of his position and his activities that is a material issue in the case, I suppose the other side would have a right in cross-examination to show whatever relevant facts it has to indicate that the picture drawn in that respect is not wholly as the plaintiffs have pictured it.

Mr. Phleger: I do not wish to press the point except to state again that our theory of the case, and our development of it is it doesn't make any difference what these people said or did. It would not operate to lose the plaintiff any of its rights, and hence testimony of this character is not material. What we attempted to develop was the position of this person, and these parties and officers as a basis for that legal contention.

The Court: I do not want to unduly prolong the introduction [433] of evidence in this case. It might be that a discussion of what are really the issues of the case might be profitable. I do not know. I always have a horror of getting into arguments

(Testimony of Michael J. Curry.)

in a case before all the evidence is in. Sometimes, however, it saves the building up of a record which in part is not necessary to be considered in arriving at a decision. It is sometimes difficult to distinguish between those two opposing viewpoints. From what I have heard of arguments so far in this case, not only now but at the pre-trial and other times, and the nature of the evidence, it has seemed to me it did not make any difference who these people are, whether they were good, bad, indifferent, or how their functions were carried out. It is just who they were and the positions they occupied, and from that, are there legal rights and obligations that flow in this unusual situation that is presented in this case? Maybe we will on both sides be unnecessarily considering factual matters, the resolution of which is not necessary at all.

Mr. Adams: Your Honor, just one remark. The documents I am offering are the contemporaneous record, the very evidence of the things done and the state of mind, the talents and the competence of the witness. They bear upon questions that developed upon the plaintiff's examination of Mr. Curry in that regard, and we regard the contemporaneous record as the best evidence. It is better than the testimony of witnesses can be, with regard to their own qualifications, which is a matter of [434] their own definition. The documents speak and are proof. And as I say, I do not want to labor this too much, but we have this in mind in offering the record,

(Testimony of Michael J. Curry.)

which to us is the best evidence on the basis of which these issues are going to be determined if there are any issues in the case of the character spoken of both by the plaintiff and the intervener in their opening statement.

The Court: I gather from what Mr. MacKinnon said yesterday that you have considerable other material you wish to present along that line?

Mr. Adams: That is correct, your Honor.

The Court: Unless that right arises by virtue of the relationship of the two companies, it would not otherwise arise, would it, because of the particular activities of any particular individuals who occupied positions or performed duties for either company?

Mr. Adams: We believe that to be true.

The Court: I understand Mr. Phleger to say that, too, but yet there has been evidence—you have got ahead of presenting some evidence with respect to this witness as to his personal activities.

Mr. Phleger: I think my opening statement made our position perfectly clear. We contend that the defendant took over and handled these tax matters.

The Court: You have presented the evidence along that [435] line.

Mr. Phleger: On that taking over, yes, and we have also presented evidence that those who acted in behalf of the plaintiff corporation were also acting in dual capacity for the defendant corporation.

(Testimony of Michael J. Curry.)

The purpose of that was to show that it doesn't make any difference what their knowledge was or what their activities may have been. They could not by their acts or activities or lack of activities lose the plaintiff any rights. Now, that is all laid out very carefully in our opening statement, and we consider them germane and we consider that they are proved. I therefore say that any evidence that the defendant, by way of cross-examination or otherwise, may offer to show knowledge or activities is immaterial, unless they intend to use that as a foundation to show that they made some contract or made some gift or took some other action, and even then it is not material because there is no corporate authority shown.

Mr. MacKinnon: May I be heard, your Honor?

The Court: Yes.

Mr. MacKinnon: The plaintiff, at the outset of its case, stated what I believe to be the legal issue. I told you that I thought there were four categories. The first I perceive to be a pure legal question, that is, Do they have a right to share in the tax background? That issue could have been presented without color. There has been, however, a complete selection of [436] documents by the plaintiff, not with the idea of giving your Honor the full story, not by any means, but to present the worst possible light. And I am not criticizing plaintiff for that. That is their prerogative. But that is the case they have made. They have had this witness, and this

(Testimony of Michael J. Curry.)

witness has protested vehemently that he was incompetent, that he was everything else. He said he was a figurehead in response to your Honor's question. Now, here is a concurrent series of documents and events and this proves in its entirety that this man was other than a very incompetent individual. It is the concurrent record. They have made this case. There is only one way in which the defendants can meet it, and that is to put the proof in. As long as this issue is being presented with color, your Honor has to have the full facts before you can sit in judgment. That is why all this material in my opinion is clearly competent.

The Court: Of course, there is no sinister connotation as to the fact that the witness was in a subordinate position. That does not in itself have, from a moral point of view, any dire results. It is merely a statement of fact that there was someone else that was in higher authority who directed these things to be done. I do not quite see the significance or the relevancy of whether they were competently done or not.

Mr. Adams: Your Honor, may I respond? You have heard arguments made here in Court on behalf of the plaintiff that this plaintiff corporation was in what has been described as a corporate coma, meaning in effect that its own officers, this witness on the witness stand in particular, the one who signed these returns, did so in a coma, in a mental daze, not knowing what he was doing. That I un-

(Testimony of Michael J. Curry.)

derstand to be a part of the contention made by our adversaries.

Mr. Phleger: That is not so at all.

Mr. Adams: I have heard the expression "coma" used here.

Mr. Phleger: That is right. I did not accuse any of the individuals of being in a coma. We were endeavoring to show the financial condition of the company, and it was very pertinent as part of the proof of showing that the tax matters of the plaintiff corporation were taken over and handled by the defendant and its attorneys and officers. Now you talk about sinister things. That is a fact. I am not connoting it at all. But it does bear upon the equities, and as I have said before, the only wrong that we complain of in this case is that they have not accounted to us for the fruits of all of these acts and transactions. If at the time they did this they had some sinister idea, then I think that was wrong. We make no such charge. We say they took over and they handled it, they used our property and they received this benefit and this advantage. We say they should account for it. They refuse to account for it. Therefore we say we have a cause arising under a quasi contract for the benefit or advantage that they achieved through the use of our property. Now, if they want to say that is bad, well, that is [438] their own connotation. I do not say that there was any malice or bad faith on their part, but they did take over and handle

(Testimony of Michael J. Curry.)

this matter at a time when these people were occupying dual positions, and when the plaintiff corporation, to use the language of our honorable counsel here, was an object of charity. [439A]

Mr. Adams: If your Honor please, counsel has just spoken to the effect that they took over, and he means by that, as I understand it, that the trustees, and following the trustees the reorganized company took this thing and dealt with it as their own. That I understand to be the effect of his statement. Now, I take it that when we have general officers and directors of the plaintiff corporation, as the present witness and others who will testify are, that the question is going to be fairly within the text of that argument: Is that so? We deny it, your Honor. We do not concede for a minute the primary statement made by counsel that this was anything taken, that this was taken over in any sense. The fact of the matter is that the corporation's officers and directors knew what was going on, understood what was going on, thought what was going on was right, and still think so, and that they were presently, then and there active representatives, duly performing the functions of their official positions in behalf of the plaintiff corporation.

Now, in order to attempt to prove that they made an opening examination of Mr. Curry suggesting that he did not know much about bookkeeping, that he did not know much about taxes, that he did not regard himself as the responsible head of this cor-

(Testimony of Michael J. Curry.)

poration but only as the figurehead, and so our endeavor, your Honor, is to bring to the Court the fact in regard to this witness that he was competent, that he was [440] diligent, that he was faithful, that he was able to do the things required of him in his official position in regard to this corporation, and that he did then and acted throughout in good faith.

The Court: Of course, there is no dispute, is there, Mr. Adams, really, that the same people were handling the affairs of both corporations, in a general sense?

Mr. Adams: Your Honor, may I state briefly—and I do not want to argue this; I know your Honor has heard it before—there was no duality with the reorganized company. The duality in the sense of the gentlemen occupying positions—and I understand that is what is meant by “duality”—was the fact that these gentlemen occupied positions of responsibility to the plaintiff and likewise occupied positions of responsibility to the trusteeship. That much is undoubtedly correct on record. We do contend, however, that that relation did not give rise to any of the disabilities that an interlocking arrangement between private corporations does give rise to.

Mr. Phleger: May your Honor please, this witness sat for three years and a half in the office of the attorney for this defendant corporation and was paid by the defendant corporation, and we showed

(Testimony of Michael J. Curry.)

a bill in here yesterday in which they are being charged for payment for his services, captive in the office of the attorney for the defendant and paid by [441] the defendant. Now, if that does not create duality, I do not know what does.

Mr. Adams: That is the contention that we have to meet, your Honor. That is the purpose. We propose to show that Mr. Curry was free, independent, talented, industrious and capable.

Mr. MacKinnon: And that the written record that was currently made demonstrates it right up to the hilt.

Mr. Levy: Your Honor, if the interveners may be heard so that we may be clear on the record: As your Honor noticed, I was standing here with Mr. Adams on my left and Mr. Phleger on my right, and our table is in the center, and that is about where we are. We are in the middle. And I think that is not mere hyperbole. I think that represents what is the position of the stockholders in this case, and it has been one of our troubles in presenting this case to you, and it has significance in this sense——

The Court: May I interrupt you for a moment to get something clear in my mind? You say the interveners are stockholders. Now, I take it that the attorneys for the plaintiff represent the corporation: they must represent the stockholders of that corporation.

Mr. Levy: They also represent Mr. Curry.

The Court: He is not a party to this litigation.

(Testimony of Michael J. Curry.)

Mr. Levy: No, sir, but he is their employer as the [442] president who hired them. I do not mean anything invidious by that, your Honor. I am just demonstrating to you that we who have the stockholders——

The Court: You say the stockholders. How many of the stockholders does the intervener represent?

Mr. Levy: Roughly 30,000 shares of which they are the owners.

The Court: And out of how many stockholders is that?

Mr. Levy: Well, the preferred stock is roughly 400,000 shares.

The Court: Well, now, concededly the attorneys, when they represent the corporation, represent the stockholders of the corporation also?

Mr. Levy: They definitely do, your Honor.

The Court: Now, the stockholders that they represent, are they in some different position than the other stockholders of the company?

Mr. Levy: No, but they are in a different position from that legal entity that sits up there and is known as a corporation. Let me take one moment to develop that, because there is some importance to it.

The Court: I am only asking you this question because it again brings up the matter that gave me some concern before, and that is what is the relation of these stockholders you represent? Are they old

(Testimony of Michael J. Curry.)

stockholders of the company or are [443] they new stockholders, or do they have a long-time interest?

Mr. MacKinnon: They are new stockholders.

Mr. Levy: Mr. Offerman goes back to 1942, and you know that. All of the other stockholders go back to 1944 whom we represent, and if that constitutes new, then Mr. MacKinnon isn't as aware of the corporate facts of life as I thought he was, because stockholders buy and sell in corporations.

But let me get back to the essential thing, your Honor, which I think is this: Let's momentarily go back to when this action was started. I don't go back for the purpose of emphasizing the fact that it was the interveners who started this case and not the corporation. Let's go back to the position of the stockholders at that time. When they looked at the facts about their corporation, which had had no stockholders' meetings for years other than the one when the James Foundation took over what was left of the corporation, they found that their officers, Mr. Curry and Miss Valouch, had been for most of their natural lives employees or officers of the railroad company. They found that Mr. Curry and Miss Valouch were employed in Whitman, Ransom, Coulson & Goetz with Mr. Coulson as a director of the railroad, with Mr. Coulson as the chief representative of the James interests, who owned 28 per cent of this railroad company. If they had stopped right there, as businessmen, they would have said to themselves that so far as there are any inter-

(Testimony of Michael J. Curry.)

relationships [444] between this railroad and this corporation, "we can't rely on either Mr. Curry or Miss Valouch to speak for the stockholders."

The Court: Let me interrupt you a minute. I have heard this type of argument in this and many cases before. But what is there about this representation of the plaintiffs by any of these people that is of any importance here except in connection with this tax matter? There is no claim, is there, that there was ever any conflict between the holding company and the defendant railroad company in any matters in any other respect, that there has been any conflict in interest, is there?

Mr. Levy: We are litigating the one question before your Honor only, and that is that these tax transactions——

The Court: The holding company owned the railroad company, and up to this point where the tax situation arose, I suppose it was a very happy family, because it was the same family.

Mr. Levy: Up until the Supreme Court's decision, it was a family. But after that, by all the normal laws, when a holding company is kicked out of a railroad, to put it in the vernacular, they go this way (indicating). That is the end of their marriage. But the normal laws didn't operate. Instead of going this way, they stayed just like they had been, this way (indicating), in the same offices, common attorneys, common officers. Now, there is nothing invidious [445] about that, your Honor, necessarily.

(Testimony of Michael J. Curry.)

But the fact does remain that from time immemorial the courts have said that when you have dual relationships, you create duties, and the duties, if they are breached, give rise to causes of action. We say that what has happened here is that this relationship has so colored and so deprived the corporation of its independent officers, that there was an unfair transaction that resulted, and this is it, and we are litigating it.

The Court: Well, all right, suppose that you were strangers at the time and there wasn't a complete separation of the officers and directors of the two companies, and the time came to file the affiliated return. If you were the attorney for the holding company, what would you have advised your client to do?

Mr. Levy: That is a perfectly good question. Momentarily I will assume the responsibility which I wasn't asked to do at this time.

The Court: I am not asking this for any reason but to see how far we should go in the taking of this kind of evidence.

Mr. Levy: All right, I will give a perfectly frank answer as to what I would have done as counsel, if this situation were presented to me, with my ignorance of taxes. I would have said this, and I will try not to be a hindsight general. I think I would have said this: "Gentlemen, you are asked to contribute to a company out of which you have just been evicted, a \$75,000,000 loss so

(Testimony of Michael J. Curry.)

that they may make \$17,000,000. Now, that is the nub of what you are being asked to do. The first thing you ought to do, before you say Yes or No, is to take a look at what is the purpose for which the Government of the United States, under its tax laws, has enabled two companies to file one tax return so that \$17,000,000 would be saved." And I would go get myself a good tax lawyer, if I didn't think I was qualified to do it, an independent one. And I say that had he looked at these books as we have looked at them, the tax books, he would have come to this conclusion, that the purpose of these two companies joining together in this consolidated return would be to give the parent that suffered the loss the benefit of an offset by reducing its taxes, and the tax saving would be a reduction of the loss. Now, that is what I would advise a client. Now, that is the basis for the complaint that——

The Court: I don't get that. What do you mean by that?

Mr. Levy: Let me clarify it if you don't get it.

The Court: You mean the parent company should join in the return provided that it got the benefit of the saving?

Mr. Levy: I am not getting to that, your Honor. I want to give you a full answer on this. I think it is an extremely important question, and goes right to the guts of this case, as I see it and as I have seen it for two years, and we have [447] struggled with this many nights and long days.

(Testimony of Michael J. Curry.)

Now, having concluded what is the basis for permitting the consolidated returns to be filed, and having deduced from that who should be the ultimate beneficiary of those savings, I would have turned to Mr. Adams, had he then represented the railroad company, and said to him, "Jim"—if I may be familiar for the moment, in the light of the hypothetical question—I would have said to him, "Jim, I have analyzed this tax law and I find that if any benefits that result from this consolidated return, in my best judgment the only people who are supposed to be benefited from it is the parent company, not this railroad company." Now, he would have probably turned to me and said, "Well, now, assuming for the moment that you are right, do you want me to recommend to my clients that they should join in a consolidated return and pay to you all of the benefits of this consolidated return? In other words, substitute you for Uncle Sam?" And being realistic about it, I would have said to him, "Well, Jim, I hardly think that your clients want to be Santa Claus, any more than mine. But you can't ask my clients to join in a consolidated return the purpose of which is to benefit my client, so that you may keep \$17,000,000." And I would say, "Well, then, let's sit down and look at the equities here." And then, sitting down and looking at the equities, I think that no one could conclude that it is fair or that it would have been fair for an [448] independent manage-

(Testimony of Michael J. Curry.)

ment, who have duties to stockholders, who have just lost \$75,000,000, for that independent management to say, "I will sign my name, you can have the \$17,000,000."

I have challenged Mr. Adams repeatedly, and I did it, I think, in this courtroom on the injunction motions, to give me one economic justification for this railroad company having \$17,000,000 worth of savings when every other railroad company paid taxes.

Now you ask me the question, your Honor, and I have given you what I conceive to be the answer.

The Court: So far in your argument you have completely convinced me that it hasn't been necessary for you to have introduced any of this sort of testimony that you have introduced, then, because the question resolves itself down into a legal issue, which has equitable facets to it, and what really has to happen is that the Court has to go back, project itself backwards, and say, if it has the power to do it, according to legal authority, to say what should have been the just transaction that should have been made at the time.

Mr. Levy: Let me just continue this. I agree wholeheartedly that that is one theory, and one approach, to this case. I think that the resolution of those questions as you have just posed them hasn't the slightest thing to do with whether Mr. Curry acted in good faith or in bad faith, or Mr. Coulson acted in good faith or in bad faith. Not the

(Testimony of Michael J. Curry.)

slightest. And I think that the case could stop there and your Honor could resolve that issue.

Now, we have taken lengthy depositions here in an effort to find the whole story, as you do when you take a deposition. You don't stop short on any narrow legal theory in the hope that the judge will agree with you, or if the judge doesn't agree with you, that the Circuit Court of Appeals will agree with you. So we went on to get the facts, the story, forgetting the legal conclusions. "Let's get the facts first." And when we got the facts, looked at them objectively, as objectively as we could, we thought that over, in the light of this position that you and I have just been talking about, and over and above that there were facts in this record that appear to us to require presentation on an additional theory, namely, that there was a conscious appropriation by some of the actors in this picture of this corporation at a time when a lot of people had given up the ghost for it and were willing to use it for the benefit of someone else. Now, your Honor knows that we have stressed that point of view and we have sought to present facts on that point of view.

The Court: I don't think that upon that issue any of the testimony is relevant. It may be upon the theory that Mr. Phleger advanced, that it would serve maybe to meet the defense that in the reorganization proceedings this matter should have been presented and received an adjudication there [450]

(Testimony of Michael J. Curry.)

on its merits, and that it is being presented for the purpose of showing that there was this measure of control on the part of the defendant which prevented that from being done. Upon that theory some of this evidence might possibly be admissible. But then it is only anticipatory.

Mr. Levy: Well, your Honor, when I read the cases, as you will undoubtedly do, on interlocking managements, the judgments that have resulted therefrom, I somehow have never found a court which would put a chart (indicating) in at the beginning of the opinion and say, "This man was president of one company, was president of the other, you had an interlocking board, now let's get to the legal issue." Because in all of these cases, you want to give not just the charts as they sit right there, because that is the duality; you want to give, "What are these men doing, what were they doing while they were handling these transactions?" There is a desire to know how they mentally functioned on these questions. And I think that a judge shouldn't necessarily be required to stop short on a legal presumption, such as the cases say there is, that there is a lack of undivided attention, a lack of independent judgment, hence there is a fiduciary relationship, hence there is a right to review for unfairness. Now, that is the narrow syllogism. But in all of these cases you have got to give some flesh and bone to it, both as a matter of trial presentation and as a matter of

(Testimony of Michael J. Curry.)

the judge wanting to [451] know what happened here. You have got to present the facts.

Now, I think that there is room for a second theory in this case, and a conscious overreaching is a second theory, and that then has this effect: It doesn't require your Honor to project and view this transaction from the point of view of fairness. It then says that if somebody consciously took, in breach of his duty, there is a prophylactic rule. What he consciously took, he cannot keep. He has to give it back, all of it, even though had he originally acted in a fair fashion, he might have been able to keep a part of it.

The Court: Well, I don't know whether I would follow you on that. I should think, offhand, that a right would have to exist first, because the mere manner of doing the thing wouldn't create a right unless there was a right in the first place. It might be evidence to support the right, but I don't think you can create a right out of the manner in which a thing is done unless the right existed already.

* * *

The Court: Well, I think under the state of the record, this has been an interesting discussion, of course, and it is [457] something that we will have to go over again more fully when all of the evidence is in. There is no doubt about that, because it is an interesting and unquestionably a somewhat difficult question. But I think that under the state of the record as it stands now, that the defendant is

(Testimony of Michael J. Curry.)

entitled to offer this testimony. I don't see any escape from that. I will overrule the objection.

Mr. Adams: At this time, your Honor, I will repeat the offer. I think I stated it some while back. It is an offer, as Defendants' Exhibit 3, of the exhibits identified as Railroad Company Defendant's Exhibits 131 to 138, both numbers inclusive, upon the taking of the deposition of Mr. Curry. And in making this offer, I am making the offer of the documents, including the penciled notations upon them, and upon the stipulations entered into at the time of the taking of the depositions as to the authenticity of the documents.

The Clerk: No. 3.

(Documents previously identified as Railroad Company Defendants' Exhibits 131 to 138 inclusive were received in evidence and marked Defendants' Exhibit 3.)

Mr. Adams: I will have another set shortly, your Honor, but I have one or two questions immediately.

Q. Mr. Curry, you recall, do you not, that during the years 1935 to May 1, 1944, the corporation was heavily indebted to the Chase National Bank, the Central Hanover Bank and the Curtis [458] Southwestern Company? A. I do.

Q. And that indebtedness totaled, did it not, many millions of dollars? A. It did.

Q. Do you recall that during 1941, 1942 and 1943 efforts were made to obtain funds to operate

(Testimony of Michael J. Curry.)

the corporation and to obtain those funds from those creditors? A. I do.

Q. And were those efforts successful in part?

A. In part, yes.

Mr. Adams: At this time, your Honor, and by way of amplification of the testimony just given and for the purposes to which I have previously referred in offering previous documents, I offer Railroad's Exhibits 140 to 178 inclusive, as taken upon the depositions, as Defendants' Exhibit No. 4, and I would state briefly some of the things they show.

They show the increasing financial difficulty of the plaintiff corporation. They show that the corporation received its financial assistance not only from the James interests but also from the Central Hanover and the Chase Bank, and that those institutions followed its activities closely; this being a matter which negatives any inference of domination or control by the James interests. They show that Mr. Schumacher, Mr. Curry, Mr. Nicodemus and his partner, Mr. Campbell, were [459] all thoroughly familiar with the financial problems of the corporation and were active and industrious in looking after its interest. They are offered also to show that the corporation was not in a position to pay for the independent tax counsel or the independent legal representation which the interveners apparently believed the corporation should have had.

Mr. Phleger: I object to that. I do not think

(Testimony of Michael J. Curry.)

that is proper cross-examination. He said it shows that Mr. Nicodemus and Mr. So-and-so and Mr. S-and-so else knew this, that and all the rest. It is remote in time. It is something like 48 exhibits now that he is dumping in in one offer. It seems to me matter of this kind should be presented as part of the defendant's case. I do not think they have any impertinency whatever.

Mr. MacKinnon: It goes to the credibility of this witness and this material has been selected with that purpose in mind.

Mr. Adams: And for the other purposes stated.

The Court: You say it goes to the credibility of the witness. In what respect? On what subject?

Mr. Phleger: If that is the purpose of it, it should be presented to the witness. You cannot dump in 48 exhibits and say it goes to the credibility of the witness. You must confront him with them.

Mr. Adams: Written current documents, your Honor, will show that this witness was right in the middle of every corporate step that was had, that he was an active participant, that not a single thing was done with respect to corporate management that he was not right in the middle directing it.

The Court: He has not said very much to the contrary.

Mr. MacKinnon: He said he was just a figure-head.

The Court: Maybe I am to blame for asking the

(Testimony of Michael J. Curry.)

question in [460] that form. He has also in answer to questions stated he was the office manager and he was familiar with the various matters that had to do with the fiscal and other effective functions.

* * *

Mr. Adams: In response to plaintiff's questions directed to that end. In any event, he is here. Those suggestions have been advanced in his opening statement, and we seek to prove in the best fashion we can the activities and competence of the witness.

The Court: You have a perfect right to cross-examine the witness concerning the nature of the activities which he has testified to on direct examination, but I do not think you can put in a whole bunch of exhibits, some of which have nothing to do with that matter. It may serve, and properly so, to sustain some of your other contentions in the case. That is the only point that is before us at this time. [470]

* * *

Q. Now, Mr. Curry, referring to the document identified as Railroad Defendant's Exhibit 140, a memorandum of January 11, 1941, is that a document which you prepared at or about its date?

A. Yes, sir.

Q. And the endorsement at the upper lefthand corner is Mr. Schumacher's initials upon it?

A. His initials—stamped initials, yes.

Q. No, in the upper lefthand corner in blue pencil, do you not find Mr. Schumacher has writ-

(Testimony of Michael J. Curry.)

ten—that is correct—“M.J.C.,” your initials, that is correct, is it not?

A. Yes, “M.J.C.” with a question mark.

Q. And you have marked in your handwriting, “discussed January 13, 1941”? [471]

A. Correct.

Q. Was that a discussion with Mr. Schumacher that you had?

A. Along the lines of the memorandum, yes.

Q. And you signed the memorandum on the bottom?

A. I initialed it, yes.

Q. Turning to the next paper, which is Railroad Defendant’s Exhibit No. 141, is that a document which was produced from the files of the Western Pacific Railroad Corporation?

A. It is.

Q. That is a copy——

A. A copy.

Q. A copy of a letter addressed by Mr. Schumacher to Mr. Coulson under date of January 14, 1941?

A. Yes, sir.

Q. With a notation of a blind copy to Mr. Nicodemus?

A. Yes, sir.

Q. Beyond the identification of the document as one produced from the files of the plaintiff corporation, do you have any present recollection of it?

A. Yes.

Q. Please state your present recollection.

A. Well, my present recollection is that Mr. Schumacher discussed the question of the cash situation of the corporation with the Central Hanover Bank.

(Testimony of Michael J. Curry.)

Q. And you discussed that matter with Mr. Schumacher and were [472] familiar with it in a general way? A. In a general way, yes.

Mr. Adams: Your Honor, perhaps I should say what I have in mind is to offer this in a group, but on further thought it might be simpler to deal with them one by one and we can dispose of them one by one so that counsel may be afforded an opportunity to object singly and not have too complex an objection. So if I may go back to the document identified as Railroad Co. Defendant's Exhibit 140, being a memorandum of January 11, 1941, I now offer that document as Defendant's Exhibit 4.

The Clerk: Do you wish these marked in a series, 4A, 4B, and so forth?

Mr. Adams: Yes.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 4A.)

Mr. Adams: Referring to a document identified as Railroad Defendant's Exhibit 141, a letter from Mr. Schumacher to Mr. Coulson, dated January 11, 1941, I will offer that as Railroad Defendant's Exhibit 4B.

Mr. Phleger: If your Honor please, with respect to that, that is letter from Mr. Schumacher to Mr. Coulson.

Mr. Adams: The witness has testified with regard to his general acquaintance with the subject matter.

(Testimony of Michael J. Curry.)

Mr. Phleger: Yes, but I do not think that is proper cross-examination. He can ask the witness whether this matter was [473] discussed and he would say yes. You do not have to put in the letter. May it please your Honor, during the recess I went through these. There are not more than two or three out of these 38 odd items that are letters or memorandums made by this witness.

Mr. Adams: I wonder if we can submit them one by one?

The Court: I do not see the point of cross-examining the witness on this letter. It may be material with respect to the subject matter of the letter, as a part of your case, but in the cross-examination of this witness I do not think that is correct.

Mr. Adams: May I develop the offer?

The Court: Yes.

Q. (By Mr. Adams): Referring to Railroad Defendant's Exhibit 141, I direct your attention to the second paragraph on page 1 of the letter. You have it before you.

A. The copy of the letter of January 14?

Q. 1941. A. 1941?

Q. Yes.

A. That is Railroad Co. Defendant's Exhibit 141?

Q. Right. You have that before you?

A. I have it before me.

Q. I direct your attention to the second para-

(Testimony of Michael J. Curry.)

graph of that letter on the first page, and reading the third sentence of that paragraph, "This was brought about through conference our [474] treasurer Mr. Curry had with Olyphant, vice president of the Central Hanover, and in accordance with resolution adopted at meeting of Board of Directors on January 10, 1935."

Q. Directing your attention to that portion of the letter, and asking your attention to the letter, do you recall at this time that the matters spoken of in the letter were brought about by your conference with Mr. Olyphant? A. Yes.

Mr. Adams: I will offer the document, your Honor.

The Court: Any objection?

(No response.)

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 4B.)

Q. (By Mr. Adams): The next document, Mr. Curry, is Railroad Defendant's Exhibit 142, being original letter of August 7, 1941 addressed by Mr. Coulson to Mr. Schumacher. Was this document produced from the files of the plaintiff corporation?

A. It was.

Q. Were you familiar with the matters that are stated in this letter at or about its date?

A. I know generally the matters mentioned, but this letter does not indicate that I saw it at the time of its receipt.

(Testimony of Michael J. Curry.)

Q. There is nothing upon that particular letter that indicates that you saw this particular letter?

A. There is nothing to indicate it came to my attention. [475]

Q. You notice the letter speaks of the fact that since 1936 there has been advanced to the corporation something over \$200,000 by the Western Realty Company?

A. Yes, sir.

Q. Were you familiar with that?

A. Yes, I was familiar with the advance.

Q. Were you familiar also with the fact that the stock of the company was all held by the Curtiss Southwestern Company as collateral?

A. With the stock of the Western Realty Company——

Q. Yes? A. I was familiar with that.

Q. And the fact that it was an under-collateralized loan which was in default?

A. I can't say as to that at this time.

Q. There was some time when that loan came in default to your knowledge, was there not?

A. Well, I am not so sure that that was under-collateral.

Q. I was speaking of the matter of its being in default. Do you recall that that loan became a default?

A. Yes.

Q. There was a time, was there not, when the loan was substantially under-collateralized?

The Court: I do not quite see the point of this.

(Testimony of Michael J. Curry.)

Mr. Adams: This is part of the corporation's financial [476] troubles, your Honor.

The Court: The witness has already testified that he had a general familiarity with all the financial affairs.

Mr. Adams: That is right, your Honor.

The Court: That, I do not think, makes any difference.

Mr. Phleger: May I point out, your Honor, that this is a letter from Mr. Coulson to Mr. Schumacher? The witness has said that he does not recall ever having seen it, and defendants then make it the basis of a series of questions of this witness with the idea it will be put in evidence. I think that is wholly improper. It is not proper cross-examination.

The Court: Do you object to it upon that ground?

Mr. Phleger: Yes.

The Court: I will sustain it.

Mr. Adams: Very well, your Honor. Will you hand the document to the Clerk, please?

The Court: Do you want that identified in some way?

Mr. Adams: Yes, your Honor. May the record show the ruling just made sustained an objection to the offer of the document identified as Railroad Co. Defendant's 142.

The Court: We will mark it 4C for identification so the record will show what it is we have been talking about.

(Testimony of Michael J. Curry.)

(The document was thereupon marked Defendant's Exhibit 4C for identification.)

Q. (By Mr. Adams): Now you have Railroad Co. Defendant's [477] Exhibit 143, next in order, Mr. Curry? A. Yes, sir.

Q. That is a copy of a letter produced from the files of the plaintiff corporation? A. Yes.

Q. Addressed by Mr. Schumacher to Mr. Coulson under date of August 14, 1941? A. Yes.

Q. Is there anything upon that letter which would enable you to say whether or not you saw the letter at or about its date? A. Yes.

Q. What is that, please?

A. The underscoring of this date "August 11" with my green pencil.

Mr. Adams: With that identification, your Honor, I offer the document as Defendant's Exhibit 4D.

Mr. Phleger: May it please your honor, this is a letter from Mr. Schumacher to Mr. Coulson dated August 14, and he is proving that the witness saw the letter. I do not think that is proper cross-examination. I do not think it is any pertinent evidence. I spent days trying to get these exhibits down to a reasonable compass so they would not overburden and overwhelm the Court. I do not think this is proper. If he wants to ask the witness whether he knew about certain things, the witness can answer. [478]

(Testimony of Michael J. Curry.)

Mr. Adams: The witness saw the document at the time and therefore it is a part of the witness' transactions.

Mr. Phleger: But he does not even characterize the document.

The Court: Counsel, what difference does it make whether the witness saw the document or not?

Mr. Adams: He shows his familiarity with all the transactions the corporation had at that time, your Honor. This is a part of that proof.

The Court: What does that involve, the familiarity of the witness with the transaction?

Mr. Adams: And participation, your Honor. The question has been raised by the affirmative proof offered here by the plaintiff, upon examining this witness, as to the attention and competence of Mr. Curry, the things he was able to do, the things that he did. It has even been suggested here that he was a kept man.

Mr. Phleger: He stayed in Coulson's office for three and a half years.

Mr. Adams: My own statement, then, meets with the same view that our adversary states. I am endeavoring to show that, far from being a person of that character, this man at all times was most diligent in looking after the affairs of the corporation.

The Court: I do not think that there has been anything to the contrary developed.

Mr. Adams: The assertion is that he was a kept

(Testimony of Michael J. Curry.)

man, the [479] inference being, therefore, that he was in possession or control of his adversary.

The Court: Is this during the period when the tax returns were prepared?

Mr. Clark: No, your Honor, this was in 1941.

Mr. Phleger: This is in 1941. The period he was in Mr. Coulson's office commenced in May, 1945, and ended December of last year, and the characterization is counsel's own. I have made no such assertion. I proved the fact that this witness was paid by the Coulson firm and in its office from the middle of 1945 until the end of 1948. I do not see what it has to do with the point we have under discussion, and it is your own characterization and not mine.

Mr. Adams: Then it should be withdrawn because I understood it to be my adversary's. Certainly I do not make that characterization. I propose to prove to the contrary, that at all times he was independent.

The Court: I suppose we ought to get some semblance of order out of this. I think I should be inclined to hold, Mr. Adams, it would be incompetent, irrelevant and not proper cross-examination to exhibit a series of documents to the witness during the period up to 1943 and ask him whether or not he saw these documents in the course of the performance of his duties. I do not see any point in my having before me a record of every transaction, letter and document that passed under this

(Testimony of Michael J. Curry.)

witness' [480] nose except at some critical time that is involved in this litigation.

Mr. Adams: That is not the purpose, your Honor, to put before your Honor a record of every transaction that Mr. Curry dealt with. These are the selected transactions that we considered material and relevant to issues in the case that are brought forward by our adversary.

The Court: Suppose the witness read a letter that his superior wrote and was familiar with it in 1941: What has that got to do with this case?

Mr. Adams: It depends upon the subject matter of the letter, your Honor.

The Court: No matter what the subject matter was, what difference does it make? He might have been a good man in 1941 and a bad man in 1943. I am just saying that colloquially. What has it got to do with this particular matter?

Mr. Adams: This witness has been examined as to his competence. It certainly deals with that matter, his competence in financial affairs. Further, it has to do with the contention that is advanced both by the interveners and, I understand, to the same extent by the plaintiff, that these gentlemen were in control of their adversaries.

The Court: But your opponents' evidence was confined to this period between 1943 and 1945. Now, that is the same old argument that is made in a lot of cases: This man was a good man at [481] some other time. We get that in criminal cases.

(Testimony of Michael J. Curry.)

He did not beat his wife, even though he might have forged his checks. What is the competence of that?

Mr. Adams: Your Honor has been told in June of 1943 the trustees took over the entire payroll, for instance, covering Mr. Curry's salary and so on—even, they say, the salaries these gentlemen received when they were officers of the plaintiff corporation—and they point that out to your Honor with a good deal of emphasis that it is significant. These things show the background.

The Court: I can save you a lot of worry on that score. I heard the witness on the stand so far and I am satisfied that he is a perfectly competent man, intelligent, and probably a pretty good railroad man. We could get into an academic discussion on that subject in connection with the particular issues that we have here; so that I do not think you need to labor the point by putting in 40 odd exhibits to show that Mr. Curry knew what was going on and participated in the affairs of the railroad company and advised concerning them during the period of time that you are referring to. That I do not think there is any necessity to do. [482]

* * *

Mr. MacKinnon: I would like to make this statement. You say with respect to the time in question. I am turning to page 295 of the record. Now, this is when he became president. That is February 1, 1942: (reading)

(Testimony of Michael J. Curry.)

“Q. Did you engage in any discussions of policy matters personally in the directors’ meetings?

“A. I did not.”

This goes back to ’42. But there is interrogation prior to that time, and it is perfectly proper that your Honor asked him the question whether he considered himself a figurehead. All this is designed to prove that when he says that, it just isn’t so.

The Court: Well, I was intending my inquiry to be directed toward the period with which we are concerned. I don’t care whether he was a figurehead in 1927 or 1934 or not. What difference does it make?

Mr. MacKinnon: Well, if the plaintiffs want to limit the issues, and the interveners, we will meet whatever issues they present. But let them frame them.

Mr. Clark: May it please your Honor, in order to obviate this very thing, at the pre-trial conference we specifically limited these issues and stated it in letter form, because the original pleadings necessarily were broad. We limited the period to that commencing March 15, 1943, because we [489] realized on the discovery proceeding, under the broad issues, that this material covered clear back, in some instances, to 1917. So in order to present the case to your Honor, we specifically limited the period of time to that commencing March 15, 1943, which is the date adopted by Mr. Phleger in his presentation as the start of the period.

(Testimony of Michael, J. Curry.)

Mr. Adams: Your Honor, a good deal of time has been consumed, occasioned no doubt by the view I had that it was appropriate to offer papers to which various and sundry objections, some of them found good by your Honor, have been made. I suggest in the interest of saving the Court's time and trying to get ahead with the case, that, it being now about closing time, we see what we can do with the papers so as to bring the matter before your Honor tomorrow morning in a way that we, from our standpoint, will think is most conducive to moving along and not absorbing too much time. I think we have your Honor's general views, and we will try to conform to them. Where we have different views, we will simply go through the appropriate procedure of making the offer and having a ruling. If your Honor feels that that is a good plan to follow, I think it will save some time.

The Court: Well, I will say to you, so that there cannot be any misunderstanding about it, that anything that this witness testified to in direct examination, be it of a preliminary or other nature, I am not giving any consideration to that [490] except as to the period that is involved here. And as to that, you can examine him. Now, merely because he testified that he was the president, became the president or occupied such and such an office in 1940 or 1939, and that at that time he only did so and so in connection with his activities, doesn't mean that that opens up on cross-examination to a

(Testimony of Michael J. Curry.)

showing that at that time he did something else; because even though he may have been mistaken at that time, when we are on the subject of credibility of witnesses in the cross-examination, we confine ourselves to the material periods. A man may have testified falsely or made a mistake with reference to some other period, but unless it is material to the issues in the case, we don't pay any attention to it. We tell juries that constantly, in cases tried in these courts, that they are entitled to disregard the testimony of a witness who has testified falsely in a matter that is material to the issue of the case. A man may have said, "I was born in 1892," when in fact he was born in 1885. If that hasn't got anything to do with the case, all right, he made a mistake or testified falsely. But it isn't germane to the case. So that what is the good of our taking up time here at this stage of the proceeding in connection with this witness' testimony on matters that haven't got to do with the material part of the direct examination?

I think you should confine yourself to the presentation [491] of any documents, in your cross-examination, that you want, or to the exploration of facts that were testified to in the periods with which we are concerned—unless there is some other tie-up that I can't conceive of at the moment that might make some inquiry into prior times proper. [492]

Tuesday, February 8, 1949—10:00 a.m.

MICHAEL J. CURRY

Cross-Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, do you recall that in March, 1943, after the Supreme Court decision in the Western Pacific Reorganization case, the creditors of the plaintiff, the parent corporation, finally refused to provide further funds to pay the current expenses of the plaintiff corporation? A. I do.

Q. Do you recall that in June, 1943, an arrangement was made for the reorganization trustees to pay all of the current expenses of the New York office from then on? A. Yes, I do.

Q. Did the corporation at that time have any other source available to it from which it might obtain funds to pay those operating expenses?

A. No, sir.

Q. Did Mr. Schumacher discuss this arrangement with you?

A. The arrangement for the taking over by the company? Is [496] that what you are referring to?

Q. The expense take-over in June 1943.

A. He talked to me after he came back to San Francisco, yes, and the arrangement had been made while he was out there.

Q. Did you discuss the idea with him before he went to San Francisco? A. No, sir.

Q. It is a fact, is it not, Mr. Curry, that shortly

(Testimony of Michael J. Curry.)

before that you did discuss with Mr. Schumacher the fact that the corporation was just about out of all money and had no resources to which to go?

A. That is right.

Q. Do you know who first suggested the possibility of obtaining the current expenses from the court's trustees?

A. It is my impression it originated with Mr. Schumacher.

Q. Do you recall whether you had any discussion with Mr. Nicodemus or his partner, Mr. Campbell, about the arrangement?

A. I did not, no, sir.

Q. Were the directors of the corporation in general informed as to its financial condition about the middle of 1943?

A. It is my recollection they were.

Q. Did any one at any time suggest to you that there was any impropriety in arranging for the trustees to pay all of the expenses of the New York office?

A. No, sir. [497]

Q. Did it occur to you that there might be anything inappropriate in doing that?

A. It did not.

Q. Do you believe now that there was anything inappropriate in making that arrangement?

Mr. Phleger: Just a moment. I object to that as calling for the conclusion of this witness. His present state of mind certainly is not a factor in this case.

(Testimony of Michael J. Curry.)

Mr. Clark: And incompetent, irrelevant, and immaterial, your Honor.

The Court: I will sustain the objection.

Q. (By Mr. Adams): When this arrangement was made in June 1943, did it occur to you that it would in any way affect the loyalty of the corporation's officers and directors to the corporation?

A. It did not.

Q. Did anyone make such a suggestion to you?

A. No, sir.

Q. So far as you know, was the loyalty of the corporation's officers and directors to the corporation in any way affected by that arrangement?

A. No.

Mr. Phleger: Just a moment. That calls for the conclusion of the witness.

The Court: Well, it does. You can ask him what, if anything, was said or done in that regard [498]

Q. (By Mr. Adams): Was anything said or done, Mr. Curry, to your knowledge, which indicated in any way that the loyalty of the corporation's officers and directors to the corporation was affected or impaired by that arrangement?

A. Not to my knowledge.

Q. Mr. Curry, you recall that you became president of the plaintiff corporation in early 1942?

A. February 1, 1942.

Q. After you became president of the corporation, from whom did you seek advice with regard to its problems?

(Testimony of Michael J. Curry.)

A. Up to the time that Mr. Schumacher retired, in May 1942, I sought his advice as well as our counsel's advice, Mr. Nicodemus.

Q. You did consult with Mr. Schumacher and with Mr. Nicodemus?

A. Every step that was taken after I became president was done after consultation with either or both, Nicodemus and Schumacher.

Q. And Mr. Nicodemus and his firm, the firm of Pierce & Greer, were the counsel to the plaintiff corporation? A. That is correct.

Q. And you have consulted with them as such counsel? A. I did.

Q. And Mr. Campbell was at the time, also, was he not, a director of the plaintiff corporation?

Strike that.

Mr. Adams: Your Honor, I think the exhibit is in evidence, and that will be the best evidence of that fact. [499]

Q. (By Mr. Adams): Do you, Mr. Curry, recall just when it was when Mr. Campbell retired from the directorship of plaintiff corporation?

A. I don't recall the exact time, no.

Q. Now, did you also discuss the corporation's problems with Mr. Osborn from time to time?

A. From time to time, yes.

Q. And did you discuss them with Mr. Wood?

A. Yes.

Q. And did you receive advice from the members of your organization?

(Testimony of Michael J. Curry.)

A. From the directors?

Q. If that is your answer, Mr. Curry, state it that way.

A. Yes, sir.

Q. All right. You recall, do you not, that Mr. Nicodemus and the firm of Pierce & Greer were engaged as counsel to the corporation in the year 1934?

A. Yes, sir.

Q. Do you know at whose suggestion Mr. Nicodemus and his firm were engaged in that capacity?

A. At Mr. Schumacher's.

Q. Is it your understanding that Mr. Schumacher had known Mr. Nicodemus prior to that time?

A. Yes.

Q. And from that time, 1934, did Mr. Nicodemus and his firm [500] also represent the railroad company and the other members of the Western Pacific group?

A. Yes, sir.

Q. And do you know at whose suggestion Mr. Nicodemus and his firm undertook the representation of the members of the group other than the corporation?

A. At Mr. Schumacher's, I recall.

Q. And is it the fact that the firm's engagement, both in the capacity of counsel to the corporation and also in the capacity of counsel to the railroad company, was approved by resolution of the Board of Directors of each of those concerns?

A. It is my recollection they were.

Q. During the period from 1934 until 1942, was Mr. Nicodemus frequently in the New York office?

(Testimony of Michael J. Curry.)

A. Yes, sir.

Q. And when we speak of the "New York office," we mean the joint office you have spoken of heretofore? A. Yes, sir, 37 Wall Street.

Q. Was Mr. Schumacher frequently in communication with Mr. Nicodemus or his partner, Mr. Campbell? A. Yes, he was.

Q. Were you from time to time in communication with Mr. Nicodemus or Mr. Campbell?

A. I was.

Q. After you became president of the corporation, did you rely [501] on Mr. Nicodemus and Mr. Campbell for advice on legal matters?

A. Absolutely.

Q. Did you frequently communicate with them upon such matters? A. I did.

Q. What would you say, Mr. Curry, as to whether or not Mr. Nicodemus and Mr. Campbell were generally well informed with regard to the affairs of the corporation?

A. I would say they were.

Q. Do you know of any major problems of the corporation of which they were not informed? And I am speaking now of the time since you became president.

Mr. Phleger: Just a moment, I think that is objectionable as calling for the conclusion of the witness.

The Court: Yes, I will sustain the objection to the last question.

(Testimony of Michael J. Curry.)

Q. (By Mr. Adams): Do you recall receiving tax advice from Mr. Nicodemus and Mr. Campbell in connection with the franchise taxes of the plaintiff corporation? A. I do.

Mr. Adams: Now at this time, your Honor, I will hand the witness a document identified as Railroad Defendant's Exhibit 726 upon taking of the depositions, being a letter, or a copy of a letter, from Mr. Curry to Messrs. Pierce & Greer, dated May 20, 1943.

(Document described above was handed to the witness through [502] the Clerk.)

Q. (By Mr. Adams): Mr. Curry, do you recall that this is a copy of a letter produced from your files which you wrote to Messrs. Pierce & Greer on May 20, 1943? A. Yes.

Q. And will you note the handwriting endorsement on the bottom of the letter, reading:

"Mr. Campbell suggested that we make reply stating that the corporation does not file New York State franchise tax.

M.J.C., 5/24/43."

Did you endorse that on the letter on or about that date? A. I did.

Q. And do you recall that that was a memorandum you made of the advice you received from Mr. Campbell at or about that time? A. Yes, sir.

Mr. Adams: I will offer the document in evidence as Defendant's 5A.

(Testimony of Michael J. Curry.)

(Letter dated May '20, 1943, from Mr. Curry to Messrs. Pierce & Greer, was received in evidence and marked Defendant's Exhibit 5A.)

Mr. Adams: Now at this time, your Honor, I will hand to the witness certain letters dealing with taxes, tax matters, of plaintiff corporation, which I will describe as follows: [503] Railroad Defendant's Exhibit 729, as introduced upon the deposition, 730, 731 and continuously through to No. 740. These documents I shall expect to offer in a moment as Defendant's 5B, and I will describe them briefly. The first is a letter of May 18, 1944, addressed to Mr. Curry by Whitman, Ransom, Coulson and Goetz.

Mr. Phleger: Mr. Curry, in what capacity?

Mr. Adams: It appears on the face of it, "Mr. M. J. Curry, Vice-President, Western Pacific Railroad Company, 37 Wall Street, New York, New York."

Mr. Phleger: That is the defendant company.

Mr. Adams: Subject to any commentary as to the reorganized company, that is correct.

The next letter, May 23, 1944, addressed by Mr. Curry to Mr. Nicodemus, and inclosing a copy of the letter just previously referred to.

The next letter, a letter of June 14, 1944, addressed by Mr. Nicodemus to Mr. M. J. Curry, President, the Western Pacific Railroad Corporation, being a response to the last preceding letter from Mr. Curry to Mr. Nicodemus.

The next letter, a copy of a letter from Mr. Curry

(Testimony of Michael J. Curry.)

to Messrs. Pierce & Greer, of October 5, 1944, referring to the same subject matter, the subject matter of all these letters up to this point being the New York State Franchise Tax. [504]

The next letter, a letter from Mr. Brua Campbell, on the letterhead of Pierce & Greer, to Mr. M. J. Curry, President, The Western Pacific Railroad Corporation, responding to the letter last mentioned.

Mr. Phleger: Will you note the fact that on the last item the receipt stamp is a receipt by the Western Pacific Railroad Company, although the letter is addressed to the Western Pacific Railroad Corporation?

Mr. Adams: That is correct.

The next letter, copy of letter from Mr. Curry to Messrs. Pierce & Greer, dated March 26, 1945, and so far all these letters refer to the New York State franchise tax.

The next letter, a form letter addressed by Tri-Continental Corporation to Western Pacific Railroad Corp., which is included in this list because it is referred to in other documents.

Mr. Phleger: Will you note that the receipt on the top of it, although the letter is addressed to the railroad corporation, the receipt is that of the Western Pacific Railroad Company?

Mr. Adams: That is correct. The document so shows.

The next letter, a letter of April 9, 1945, ad-

(Testimony of Michael J. Curry.)

dressed by Mr. Nicodemus to Mr. Curry as President of The Western Pacific Railroad Corporation, refers to the letter last mentioned, and contains this paragraph:

“My suggestion is that you call Mr. James K. Polk [505] and ascertain whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental Corporation and be guided by his recommendation as to the answer to be made pursuant to this inquiry.”

Mr. Phleger: Mr. Adams, will you also please state or admit that the stamp on that letter is the stamp of receipt by Western Pacific Railroad Company, although the letter is addressed to Mr. Curry as President of the Western Pacific Railroad Corporation?

Mr. Adams: All these things appear on the face of the documents I am offering. That, of course, is correct.

Mr. Phleger: That is not the point. The point is as you characterize these documents I take it you are assuming to state the essential and important facts. You take great care to point out that the letter is addressed to Mr. Curry as President of the corporation, and I think it important and pertinent to state that the receipt is in the name of the company. I think that is important.

Mr. Adams: Mr. Phleger's view as to what is important——

Mr. Phleger: I would not interrupt if I did not think it was important.

(Testimony of Michael J. Curry.)

Mr. Adams: I take it Mr. Phleger would not interrupt if he did not regard it as important. I have called to the Court's attention the designation of Mr. Curry when a letter was [506] addressed to him because in the case Mr. Phleger pointed out there was a letter addressed to him as Vice-President of the railroad company.

The next letter is a copy of a letter from Mr. Curry of April 10, 1945, addressed to Mr. James K. Polk of Messrs. Whitman, Ransom, Coulson & Goetz and refers to the Tri-Continental form letter of March 23, 1945 and says:

"I referred this to Mr. Nicodemus of counsel for this corporation for advice as to nature of reply to be made and he suggests I ascertain from you whether any of the James corporations are concerned with the same request that has been made by the Tri-Continental and advise me, if you will, please, as to answer to be made to the inquiry."

The next letter is one of April 11, 1945, addressed by Mr. Curry to Tri-Continental Corporation, and I will read it and the endorsement upon it:

"In response to your letter of March 23 this is to advise that The Western Pacific Railroad Corporation did not file a New York state franchise tax report during the year 1944.

"Yours very truly,

B.C.C. Mr. F. C. Nicodemus, Jr.

"See your letter of April 9. The above letter was written on suggestion made by Mr. Polk over the phone [507] today."

(Testimony of Michael J. Curry.)

The next letter is one of April 23, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer, attention Mr. F. C. Nicodemus, Jr., and I will read it:

“I will refer you to my letter of October 5, 1944, your reply dated October 11, 1944, in regard to the franchise tax imposed by Article 9-A of the amended New York tax law.

“As the first return required to be made will be due May 15, 1945, which date is rapidly approaching, I would appreciate your prompt advice as to what should be done in the matter so far as the Corporation is concerned.

“Mr. Polk of the firm of Whitman, Ransom, Coulson & Goetz, as I understand, has this question under consideration and I suggest you consult him in the matter.

“Yours very truly,

“Copy to Mr. James K. Polk,

“Whitman, Ransom, Coulson & Goetz.”

And the last one on the list is a letter, a copy of letter of April 26, 1945, addressed by Mr. Curry to Messrs. Pierce & Greer, referring to his of April 23, and quoting for Mr. Nicodemus' information an item which appeared in the New York Times on the New York State tax, with copy to Mr. James K. Polk. I will ask the clerk to hand these letters to Mr. Curry so that he [508] may identify them.

Q. Mr. Curry, will you please look at each of those documents, being marked consecutively Rail-

(Testimony of Michael J. Curry.)

road Defendant's 729 to 740, both numbers inclusive, and state whether or not the documents were produced from your files.

Mr. Phleger: Just a moment. When you say "your files"——

Mr. Adams: That is a fair question, and I will ask Mr. Curry to designate what files in answering the question.

Q. Where are the files now located?

The Court: Why take all the time of the witness looking through these? Is there any question about where they were produced from?

Mr. Phleger: No.

The Court: Where were they produced from?

Mr. Adams: My understanding is that these documents were all produced from the files of the Western Pacific Railroad Corporation.

The Court: Is that correct?

Mr. Phleger: I would not dispute that.

Mr. Clark: Located, though, your Honor, in the offices of Whitman, Ransom, Coulson & Goetz.

Mr. Phleger: The testimony already shows that. That is where the files were.

Q. (By Mr. Adams): It would appear they were there from about June 1, 1945, to some date in September 1948, as I understand it; [509] that is correct, is it not, Mr. Curry?

A. I beg your pardon?

Q. The corporation's files during the period from the time you entered in the office in the suite

(Testimony of Michael J. Curry.)

of Whitman, Ransom, Coulson & Goetz in June 1945, remained in your office and there until you removed them from that place in September of 1948?

Mr. Phleger: Just a moment. This assumes a fact which is contrary to the evidence. Exhibit 2 shows that the tax files are still there.

Mr. Adams: I am speaking of the corporation's files from which these documents were produced, and I think Mr. Curry understands this.

Mr. Phleger: We want the record to be clear.

Mr. Adams: Surely. We are both cordially in agreement about that.

Q. Mr. Curry, you were asked generally about the corporation's files. Do you recall Mr. Phleger asked you some questions on your direct examination? A. Yes.

Q. Are these the facts, that the corporation's files, excluding Federal income tax files and Federal excess profits tax files, exclusive of such files were the corporation's files after the New York office was closed removed to your office in the suite of Whitman, Ransom, Coulson & Goetz?

A. That is correct. [510]

Q. And did you from that time forward have those files in your office in that suite?

A. I did.

Q. And you had control over them?

A. I did.

Q. And you had keys to those files?

A. There were really no keys—well, yes, there

(Testimony of Michael J. Curry.)

was one key that locked all the files, that is right. I had charge of that.

Q. You had charge of those files. And is it the fact that they remained there in that office until, at Mr. Coulson's request, you vacated that office?

A. That is correct.

Q. When you vacated that office you referred to the fact that those files were removed from that office?

A. I did.

Q. And taken to your new office as president of the corporation?

A. I did.

Q. That is correct, is it not?

A. That is correct.

Q. And all of these papers were produced from those files, is that the fact?

A. That is my belief, looking these over.

Mr. Adams: I will offer the documents upon the stipulations previously entered. Excuse me, Mr. Curry. Did you want to say something further? [511]

The Witness: Inasmuch as they are tax matters, I am not so sure that they were taken out of my general file. Some of them may have been in the tax files.

Mr. Adams: I think the depositions identify the documents, but if there is any question about it, your Honor, as to the source from which these papers were produced, I would have to refer back to the depositions, and at which time stipulations were made on each of these papers, and we will

(Testimony of Michael J. Curry.)

identify the source from which they were produced. I would like to make the offer of this exhibit, which is Defendants' 5-B, upon the stipulation that was entered into at the time of the taking of the depositions, of the authenticity of the documents and the fact that letters were sent and received at or about their dates.

(The letters referred to were received in evidence and marked Defendants' Exhibit 5-B.)

Mr. MacKinnon: As one exhibit, Mr. Adams, 5-B?

Mr. Adams: As one exhibit.

Q. Mr. Curry, do you recall receiving tax advice from the firm of Pierce & Greer concerning the capital stock tax of the plaintiff corporation?

A. I do recall, yes.

Q. Do you recall corresponding with Messrs. Nicodemus and Campbell, and also with Mr. Polk in connection with that subject matter? [512]

A. Yes.

Mr. Adams: At this time, if your Honor please, I will hand to the witness letter of January 11, 1943, addressed by Moody's Investors Service to Mr. T. M. Schumacher, Trustee, Western Pacific Railroad Co., 37 Wall Street, New York City, wherein—

Mr. Phleger: Have you the number, please?

Mr. Adams: Oh, yes. Railroad Defendant's 439.—wherein the following appears:

(Testimony of Michael J. Curry.)

“In analytical work, dealing with railroad securities, the Federal income tax liability (past, present and future) and the correct method of computation based on accurate knowledge of the various basic factors is today more important than ever. We in our work here at Moody’s have naturally had to make estimates, but sometimes, due to inadequate knowledge of the facts, our tax calculations have not been as accurate as we would wish. We wonder if you would be willing to be of help to us regarding the above, and on the possibility that you would, we are returning a tax form, a return of which, filled out (even on a tentative basis) would be of great assistance. We should be glad to hold any information furnished us in confidence if you desire.”

And there is attached to this letter a list of particular items of the character described. In connection with that [513] letter I will also hand to the witness a copy of a letter dated January 13, 1943, addressed to Mr. Walter F. Hahn, Manager, Railroad Department, Moody’s Investors Service, signed M. J. Curry, and containing in part these statements:

“Your letter of January 8, addressed to Mr. T. M. Schumacher, Trustee, has been turned over to the undersigned for reply.

“As the Western Pacific Railroad Company is included in the consolidated income and excess profits tax returns filed by the Western Pacific Rail-

(Testimony of Michael J. Curry.)

road Corporation (parent company), we show below estimated consolidated figures of which the companies pre-tax net income is \$15,290,248."

And then there follows some computations, the last line of which is:

"Accrued in 1942—estimated, \$3,693,994."

And then follows:

"No provision has been made for accrual of excess profits tax since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused profits credit carryover."

"It will be appreciated if you will treat the above information confidentially."

I will ask the clerk to hand these to Mr. Curry. [514]

(Two letters handed to the witness by the clerk.)

Q. (By Mr. Adams): Do you recall the fact that Mr. Schumacher handed you the Moody's letter, Mr. Curry, for reply? A. I do.

Q. And is Railroad Defendant's Exhibit 440 the reply which you made to Moody's with respect to its inquiry? A. Yes.

Mr. Adams: I will offer the documents, your Honor, as Defendants' 5-C.

(Letter, January 11, 1943, Moody's to Schumacher; and letter, January 13, 1943, Curry to Moody's, were received in evidence and marked Defendants' Exhibit 5-C.)

(Testimony of Michael J. Curry.)

The Witness: Am I permitted to make some explanation of this letter?

Q. (By Mr. Adams): Do you wish to make some explanation? A. Yes.

Q. Go ahead.

A. It was not prepared by me, it was prepared by Miss Valouch.

Q. Which one are you now referring to?

A. I am referring to the reply to the Moody's Investment Service.

Q. Did you read it before you signed it?

A. I read it before I signed it.

Q. Did you understand it?

A. Miss Valouch was Mr. Schumacher's secretary, and she prepared it and then placed it before me and I signed it. [515]

Q. Mr. Curry, would you please look at the Moody's letter. A. Yes.

Q. What is Mr. Schumacher's endorsement on it? A. He just hands it over to me.

Q. Read it, please.

A. He turned it over to me and requests——

Q. Does it state anything? I mean, Mr. Schumacher's endorsement?

A. It doesn't say anything to me, it just questions——

Q. No, read it, whatever it is. I don't have it before me.

A. Well, in his blue pencil, "M.J.C.," with a question mark in blue, and under that, "M.C.V." in green, which was my pencil.

(Testimony of Michael J. Curry.)

Q. Your signature? A. Yes.

Q. Turning to Railroad's 440, which is the second letter in Defendants' 5-C, you have said that Miss Valouch prepared that letter for you?

A. Yes, sir.

Q. Did you read it before you signed it?

A. I did.

Q. Did you understand it?

A. Yes, generally; but as for the assembly of the figures, and so forth, you know, Federal tax matters or any tax matters were wholly Greek to me. I didn't understand them at all, and any time I got any question about taxes, it was always referred [516] to Miss Valouch or Mr. Polk.

Mr. Adams: I move to strike out the last statement as wholly volunteered.

Mr. Phleger: Well, no, I think that is responsive. He asked him whether he understood the letter.

The Witness: I am telling you why I didn't.

The Court: You asked him if he understood it. It calls for perhaps a Yes or No answer. It is not too far afield to allow the answer to stand. I will allow it to stand.

Q. (By Mr. Adams): Mr. Curry, would you please tell me what in your letter, this letter of January 13, 1943, you did not understand, aside from the computation of the particular figures in it?

A. I would say there wasn't hardly any of it

(Testimony of Michael J. Curry.)

that I understood, because it is all tax, "pre-tax net income and apportionment of tax," and I didn't understand just what those things were. I relied on our tax counsel and Miss Valouch.

Mr. Adams: Move to strike out the last portion. This question was, What in the letter was it that he didn't understand, and I would like to have his attention devoted to answering my question.

The Court: I will allow the answer to stand.

Mr. Adams: Very well.

Q. Now, Mr. Curry, again I ask you to point out to me the things in the letter that you didn't understand. Do I [517] understand you—Strike the question, first.

Do I understand that you say you didn't understand what apportionment of taxes meant?

A. Yes, I understand what apportionment means.

Q. Please state what it means.

A. It is division between the various companies.

Q. And did you understand that? A. Yes.

Q. The fact is you had understood that since 1927, isn't that true?

A. There are some things generally that I understood in Federal taxes.

Q. Would you answer my question, please. You understood what was meant by apportioning income taxes between members of the group since 1927, isn't that true? A. That is true.

Q. Now, what is in the letter, besides the figures, that you didn't understand?

(Testimony of Michael J. Curry.)

A. Well, the statements in there were, it says, "No provision has been made for accrual of excess profits tax, since it appears whatever excess profits net income there may be will be more than offset by the excess profits credit and the unused excess profits credit carryover."

Those are things that I just couldn't seem to understand in Federal tax matters. [518]

Q. Did you understand what was meant by "excess profits tax"? A. Generally, yes.

Q. Do you have any doubt about that?

A. No.

Q. Do you understand what is meant by "excess profits net income"?

A. I don't—I can't say that I did.

Q. What you mean by that, I take, is that you were not familiar with the precise provisions of the tax law which enter into the computation of excess profits net income, is that what you have in mind?

A. Yes, I believe that is what I have in mind.

Q. You did know, did you not, that there was an excess profits tax and that was levied against the net income as defined by the regulations?

A. I am a little confused. I didn't attempt to know the detail or to learn the detail of those things, because, as I say, Federal tax matters were Greek to me and I didn't attempt to study the regulations or know the regulations. As I stated, I depended on our tax counsel to see that the proper

(Testimony of Michael J. Curry.)

returns were filed and figures assembled, and so forth.

Mr. Adams: I take it, your Honor, that—I have made motions to strike, and there have been these explanations afforded by the witness. I don't want to take up your Honor's time by moving to strike these things each time they come along. [519]

The Court: Well, Mr. Adams, maybe I am as stupid about this as the witness is about tax matters, but I don't see where we are getting. If you tell me that you are attempting to show that this witness was fairly conversant with tax matters and thoroughly competent to make the decisions on taxes themselves, then of course the examination would be clearly pertinent.

Mr. Adams: Well, I have some such object in mind.

The Court: But if, as usually is the case, apparently that is what you are getting at here, you have got all kinds of tax lawyers in the case that tend to these matters; now, do you want to show that this witness was competent to make all these decisions himself, without the tax lawyers?

Mr. Adams: Oh, no, your Honor.

The Court: Well, what is it that you are trying to show?

Mr. Adams: What I want to show is that this witness knew more about taxes—he knew considerable about taxes, and I will go ahead with my proof. I don't want to take up too much time in details about a particular document.

(Testimony of Michael J. Curry.)

Mr. Phleger: I am not making objections as we go along, because I don't want anything pertinent not to be in the record, and I don't want to make myself objectionable by making objections. But our theory of this case is that it doesn't make any difference what this witness knew. It is utterly a false quantity in the case. There isn't anything this witness could [520] have done, either by himself affirmatively, by taking affirmative action or not taking action, that would destroy this plaintiff's claim in this case.

Mr. Clark: That is also the intervenor's theory.

Mr. Phleger: It is just utterly immaterial, but I am not objecting to all those things. I just think they are wholly and utterly immaterial.

Mr. Adams: Your Honor, I have only one purpose, and that is to confine myself to cross-examination within the limits of the original interrogation, and I will read to your Honor what was stated by counsel when he opened that examination. He said, "I want to establish the general nature of the functions of this witness in order that your Honor may have some general idea of his capacity and have the manner in which he conducted the various positions which he held."

The Court: I don't think that counsel was referring to capacity in the sense of ability.

Mr. Phleger: That's right.

The Court: But in a legal sense, what position he occupied and what authority he had. I have

(Testimony of Michael J. Curry.)

thought right along that there has been too much time spent on this. If you lawyers think there is something important in that which goes to the heart of the case, I don't want to stop you, but what difference does it make whether this man knew taxes, or how much he knew or how little he knew? It is not a question of his competency, it [521] is a question of his capacity in the legal sense, what position did he occupy, what were his functions. It is not whether he did them well or did them poorly or whether he knew more about taxes than he is willing to tell you now on the witness stand. What has that got to do with it?

Mr. Adams: I did not understand the statement about capacity in the way just stated by your Honor, and apparently neither did interveners' counsel, whose statement appears in the transcript, page 338, saying with reference to Mr. Curry: "As he is painted by Mr. Phleger's examination, he was simply a figurehead and knew nothing."

We understand we have to address ourselves to that on cross-examination. Now, I would further state—we are speaking of taxes themselves—that it was developed upon the direct examination that Mr. Curry signed the returns that were put before him. That was all. And it was developed that he had done that for a number of years. Now, those facts were developed, you heard argument now that it is immaterial. But the facts have been developed, and we think it is material, your Honor, to

(Testimony of Michael J. Curry.)

show that Mr. Curry had a considerable acquaintance with Federal taxes. That was done in response to the direct examination which opened up the question of his knowledge and experience in that field.

The Court: Well, I will hold now, so that it will save time for all concerned, that I give no weight to any testimony [522] heretofore introduced by the plaintiff or the intervener that goes to the question of the special competency of the witness or his ability to perform functions, but that I am only giving weight to such testimony as heretofore has been presented that goes to the legal position that the witness occupied and what his functions were as such. Therefore it is unnecessary for you to conduct a cross-examination to show how much or how little this witness knew or what his intellectual or other capacities or abilities were; because I will hold now that I am not giving any weight to that. So that it would therefore be redundant to offer any further testimony along that line. I didn't consider that the plaintiff's testimony was along that line, although it might have had that implication to you.

So in order to clear that up, I will make that ruling now so that the decks will be cleared of that matter. You needn't put any cross-examination in on it, because I am not going to give any weight to any part of the plaintiff's testimony that is concerned with that field. [523]

(Testimony of Michael J. Curry.)

The Court: I did not want to make that too narrow a distinction. In other words, there may be cases where the functions that were performed, and that were explored in the direct examination were of such a nature that it might be difficult to wholly separate the manner of doing from the function itself. But I merely wish to indicate that I did not see any point in just developing the theme as to the competence which functions were performed, because I felt that that was immaterial.

Mr. Adams: At this time I will proceed with a new subject.

Q. Mr. Curry, do you recall that in December, 1942, and January of 1945 there were estimates made of the 1942 income and excess profits tax liability?

A. I do not recall it definitely.

Q. Don't you recall, Mr. Curry, that there was correspondence between Mr. Schumacher and Mr. Elsey at or about that time with respect to estimates of the tax liability for the year 1942?

A. I have a recollection of that, yes, sir.

Q. I would like to show you Railroad's Exhibit 273, a telegram to DeGraff, dated March 2, 1943. Is that a copy of a telegram which you sent to Mr. DeGraff at or about that date?

A. Yes, sir.

Mr. Adams: I will now read this to the Court: "New York, March 2, 1943, D. C. DeGraff, Western Pacific Railroad Company, 526 Mission Street, San Francisco, California. Wire date.

"At the conference with accountants here yester-

(Testimony of Michael J. Curry.)

day decided file consolidated tax returns including subsidiaries you list. In view this we filed yesterday request for extension time to May 15. Am hopeful will be granted and will advise you promptly. Glad you are preparing necessary working schedules and tentative declared value excess profits tax returns and expect forward latter part this week. Our understanding regarding that consent not in accord with yours. See Paragraph I, Page 2, instructions for form 1120 which in our opinion requires such consent. This has been confirmed with the revenue agent here, [525] who states forms of consent have been printed and are available for 1942 returns. Procedure same as last year. Signed M. J. Curry."

I will offer the document as Defendant's 6.

Mr. Clark: If it please your Honor, may we also have the notations offered as a part of this exhibit, particularly the writing "M.C.V., o.k., M.J.C."

Mr. Adams: That is correct. That appears upon it.

Q. Mr. Curry, that is in your handwriting, is it not? A. It is.

Mr. Phleger: And also the notation that the telegram was charged to the Western Pacific Railroad Company.

Mr. Adams: The document is offered in its entirety. It carries also Mr. Curry's office stamp "M.J.C. March 3, 1943." Will you hand it to the Clerk so that it may be marked?

(Testimony of Michael J. Curry.)

(Telegram referred to was thereupon received in evidence and marked Defendant's Exhibit 6.)

Mr. Phleger: Your Honor, I do not like to interrupt, and perhaps it is wrong, but the telegram to which this is an answer is an important part of this series. For instance, it is addressed to Mr. Curry in his capacity as vice president of the Western Pacific Railroad Company, which I think is important. I do not like to break in, but if he introduces a wire which is an answer to another, it might save time if he would introduce the wire to which it is a reply. [526]

Mr. Clark: They were separate exhibits on the deposition, your Honor.

Mr. Adams: I have no objection, your Honor. It seems as if this were a one way street, however, and my purpose in offering this document hasn't anything to do with the fact just announced by counsel. Does your Honor feel that it is necessary for me to introduce papers requested by counsel?

The Court: I do not think so. It would be up to the other side to put in the other telegram. Sometimes we can facilitate matters if it will save time.

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's Exhibit 6, your telegram to Mr. DeGraff of March 2, 1943, you see in the first line it reads "at conference with accountants here yes-

(Testimony of Michael J. Curry.)

terday decided file consolidated returns including subsidiaries you list." Do you note that?

A. I do.

Q. At the date that telegram was sent, Mr. Curry, March 2, 1943, it is the fact, is it not, that neither the firm of Whitman, Ransom, Coulson & Goetz nor Mr. Polk had been retained to do any tax work?

The Court: That is an established fact. This was about three weeks before that.

Mr. Adams: I am just directing the witness' attention to that.

Q. That is a fact, is it not? [527]

A. Well, they were employed early in 1943 but I can't recall just what date. But if this was before or after, it is my impression it was before they were appointed.

Q. Referring to the conference mentioned in the telegram of March 2, 1943, do you recall the conference which is referred to there?

A. I do not.

Q. You have no recollection of it whatever?

A. I have no recollection of it.

Q. Who were the accountants to which the telegram referred?

A. Lybrand, Ross Bros. & Montgomery, I believe.

Q. You knew that at the time? A. Yes.

Q. Now, it is the fact, is it not, that this conclusion to file a consolidated return was reached

(Testimony of Michael J. Curry.)

before the Whitman Ransom firm had been employed as tax counsel?

A. That is my recollection.

Mr. Phleger: Perhaps it will help if I make this statement:

Mr. Adams: May I ask that objections be stated in the ordinary style?

Mr. Phleger: I will object to further questions along this line. It is our theory that all of these occurrences which took place prior to March 15, when the economic unity was severed, that is, the decision of the United States Supreme Court which destroyed the economic unity, are irrelevant and immaterial. At the time that is just being testified to, the plaintiff corporation was the owner of all of the stock and there was outstanding a decision of the Circuit Court of Appeals which in effect said that it was going to have the equity or an interest in the equity of the reorganized road. The event which made the change had not yet taken place. Now, I did not make that objection, because I did not want to be in a position of making objections, but that is our position and I think all of this is not material, just as I think that all the evidence they are going to introduce of what happened back in 1917 with respect to consolidated returns is also not material. The thing that is material is what was done after the economic unity was severed on March 15, 1943.

Mr. Adams: Mr. Phleger, counsel in his opening examination asked these questions:

(Testimony of Michael J. Curry.)

“Q. Now, Mr. Curry, did you ever prepare a tax return? “A. No, sir.

“Q. For either the corporation or the company?

“A. No, sir.”

Later on:

“Q. Mr. Clark, this testimony is directed to what time?

“Mr. Phleger: I will do that.

“Q. What period of time are you referring to in the testimony you have just given?

“A. Up to the year 1942, as I recall.” [529]

And another question asked by counsel for the plaintiff, the witness' attention was directed to the returns for '42, '43 and '44, and he answered that to them. In each case he saw the returns, he answered, when Miss Valouch presented them to him. He inquired of her whether they were in satisfactory form and if Mr. Polk approved them, and then he signed them. My cross-examination is within the lines just opened.

The Court: Now what was the question?

Mr. Phleger: If I may say, I did not object to a question. I wanted to state my position with respect to this line of testimony, and there was no question before your Honor at the moment.

Mr. Clark: I think the subject of inquiry, was, your Honor, as to whether or not Whitman, Ransom, Coulson & Goetz were tax counsel at the time this telegram was sent.

Mr. Adams: I have the question, your Honor.

(Testimony of Michael J. Curry.)

The Court: All right.

Mr. Adams: The question is this:

Q. As a matter of fact, Mr. Curry, this conclusion to file a consolidated tax return for the year 1942 was reached, was it not, before Whitman, Ransom, Coulson and Goetz firm had been employed as tax counsel?

The Court: You mean the decision that is referred to in this telegram, Defendant's Exhibit 6?

Mr. Adams: Yes, your Honor. [530]

The Court: Written on March 3, was it?

Mr. Adams: March 2.

The Witness: March 2.

The Court: Well, that is obvious. The answer is "yes." I will answer for the witness.

The Witness: That is right.

The Court: Of course it was before. It was on March 2 and the Coulson firm wasn't employed until the 25th.

Mr. Adams: March 23 is the date of the letter which initiated the suggestion of employing that firm. I think the record accurately shows that.

Q. Now, Mr. Curry, did you, pursuant to the decision that was made at this conference, file a tentative consolidated return on or about March 15, 1943? A. It is my recollection we did.

Q. And that tentative consolidated return was the return of the parent company?

A. Yes, sir.

Q. And included the subsidiaries? A. Yes.

(Testimony of Michael J. Curry.)

Q. Including the Western Pacific Railroad Company, is that right? A. Yes, sir.

Q. Did anyone tell you to sign that return?

A. Tell me to sign it? [531]

Q. Yes.

A. I don't know that I understand just exactly what is meant by telling me to. It was placed before me and I asked if it was all right, and if it had Mr. Polk's o.k., and when I was told "Yes," then I signed it.

Q. And you bear in mind that you are now speaking of the tentative return that was filed March 15, 1943? A. Yes, sir.

Q. And is it your testimony that you were told that return had Mr. Polk's approval?

A. Yes, all returns that were placed before me had his approval. I always inquired of that.

Q. How about the return for the year 1941? Did that one have Mr. Polk's approval?

A. No.

Q. Now bearing in mind we are speaking of the tentative return of March 15, 1943, did that one have Mr. Polk's approval? Was that your understanding?

A. No, that was before the time they were employed.

Q. Now then, my question was, relating to that tentative consolidated return, did anyone tell you to file that return—strike that—to sign that return?

A. Well, Miss Valouch informed me of the de-

(Testimony of Michael J. Curry.)

cision, and I signed the tentative return.

Mr. Adams: May I have an answer to my question, your Honor, [532] whether anyone told him to sign the return?

The Court: Well, what was the witness' answer?

(Answer read by the reporter.)

The Court: Well, it is in part an answer.

Mr. Adams: Could I have yes or no along with the explanation, please?

The Court: Can you answer that yes or no? Did someone tell you to sign the returns?

The Witness: Yes.

Q. (By Mr. Adams): Who told you to sign the returns? A. Miss Valouch.

Q. Did you customarily receive instructions from her?

A. I customarily didn't receive instructions, but I relied on her in the tax matters.

Q. Isn't it the fact, Mr. Curry, that she was working on those income tax returns under your supervision and direction?

A. Yes, that is true.

Q. You were her boss in regard to those matters? A. That's right.

Q. No one else told you to file the returns?

A. No.

Q. Now the tentative consolidated returns show an estimated tax, did it not, of \$4,209,948, and in that connection I will refer to Railroad Defendant's Exhibit 282, as introduced on the taking of the depositions, being a letter or copy of a [533]

(Testimony of Michael J. Curry.)

letter, addressed by Mr. M. J. Curry, Treasurer, to the Collector of Internal Revenue, Second District of New York, Customs House, New York, of March 15, 1943, and ask that the Clerk hand this document to the witness.

(Document handed to witness by the Clerk.)

A. Yes, sir.

Q. And it is a fact, then, that the tentative return showed an estimated tax in that amount?

A. Yes.

Mr. Adams: May I offer the document as Defendant's Exhibit 7?

The Clerk: Exhibit 7.

(The letter of March 15, 1943, Curry to Collector of Internal Revenue, was thereupon received in evidence and marked Defendant's Exhibit 7.)

Q. (By Mr. Adams): Was a quarter of this estimated tax paid when the return was filed?

A. Yes, sir.

Q. Where were the funds obtained to make that payment? A. From the railroad company.

Q. That is to say, from the railroad company then being administered by the trustees?

A. Trustees, that's right.

The Court: Did the holding company have any income at that time? [534]

Mr. Adams: No, your Honor, the holding company had a loss which was entered in that return and which operated as consolidated returns always

(Testimony of Michael J. Curry.)

operate, as one of the deductions.

The Court: Yes, I understand that. Did this loss of the holding company, in connection with the other stock—was that in connection with the other stock it held?

Mr. Adams: No, your Honor, it had no relation to the stock loss. The amount was, as I remember, approximately \$350,000 and it was a current operating loss. I cannot give your Honor the details of that.

The Court: The expenses exceeded the income?

Mr. Adams: Yes, the expenses and more than the expenses—the current interest on the indebtedness of the plaintiff corporation was a part of that net loss.

The Court: I see.

Mr. Clark: It was accrued interest on the debts of the corporation that are subject of that November 22 agreement, later.

Mr. Phleger: The loss didn't come in, your Honor, till the claim for refund was filed in 1945, March 9.

Mr. Clark: That is the stock loss.

Mr. Phleger: The stock loss, I am referring to.

The Court: Yes. But we are talking now about——

Mr. Phleger: The other loss?

The Court: The other loss. That was what prompted my [535] inquiry, what was this loss upon which the tax of \$4,000,000, or some odd dollars, was calculated.

(Testimony of Michael J. Curry.)

Mr. Clark: It was chiefly accrued interest on these loans.

The Court: That is the loss of the holding company, aside from the loss of the stock.

Mr. Clark: Yes, your Honor.

The Court: In the operating. All right, go ahead, Mr. Adams.

Q. (By Mr. Adams): Was the balance of the 1943 tax also paid with funds obtained from the reorganization trustees? A. Yes, sir.

Q. Now I would like to direct your attention to Plaintiff's Exhibit 39A, a letter from Mr. Schumacher to Mr. Nicodemus, dated March 23, 1943.

(Document handed to witness by the Clerk.)

Q. (By Mr. Adams): Now, Mr. Curry, directing your attention to Plaintiff's Exhibit 39A, being an original letter from Mr. Schumacher to Mr. Nicodemus, March 23, 1943, I call your attention to the first paragraph (reading):

"Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942."

Do you recall that talk?

A. I don't recall it. [536]

Q. You have no recollection of it?

A. I have not at the present time.

Q. When you say you have not at the present time, Mr. Curry, do you have any qualification in your mind?

(Testimony of Michael J. Curry.)

A. No, I have no recollection of the talk.

Q. Now do you have any recollection of discussing the subject matter of this letter, Plaintiff's 39A, with Mr. Schumacher?

A. I don't recall it.

Q. You have no recollection of it?

A. I have no recollection of it.

Q. Do you recall that in April, 1943, the firm of Whitman, Ransom, Coulson & Goetz was employed by the trustees to act as tax counsel?

A. Yes, sir.

Q. And do you know who originally recommended the employment of that firm as tax counsel?

A. I don't know who originated it.

Q. And you have no recollection of discussing that subject with Mr. Schumacher?

A. No, it is my recollection that he and Mr. Nicodemus discussed the matter.

Q. What is your recollection about that?

A. Well, my recollection is that Mr. Nicodemus and Mr. Schumacher talked over the matter of employing tax experts to handle our tax matters. [537]

Q. Did you participate—strike that. Were you present during any such discussion between Mr. Schumacher and Mr. Nicodemus?

A. No, not as I recollect.

Q. And when you speak of recollection about it, do you have in mind that either Mr. Schumacher or Mr. Nicodemus told you about that?

A. That's right.

(Testimony of Michael J. Curry.)

Q. And do you have a recollection as to which one told you? A. Mr. Schumacher told me.

Q. Now I hand you a copy of a telegram, Railroad Defendant's 293, dated May 7, 1943, addressed by you to Mr. DeGraff, charged to the account of the Western Pacific Railroad Company, and I will read the first sentence of this telegram (reading):

“Reference question income and excess profits tax returns 1942 colon tax lawyers have decided we should file consolidated returns, which will do on or before May 15.”

Mr. Adams: Will you hand this to the witness, please?

(Document handed to witness by the Clerk.)

Q. (By Mr. Adams): Up in the upper left corner, the initial in green “M.C.V.”; did you write that on the document? A. Yes.

Mr. Phleger: That is Miss Valouch?

Q. (By Mr. Adams): That is Miss Valouch?

A. That's right.

Q. And did you have in mind, in putting her initials on the document, to make sure that she saw it after it had been sent?

A. No, my recollection is that the copy was on my desk, and I read it and then marked it back to her for the tax files.

Q. The fact is, is it not, Mr. Curry, that no telegrams were sent out over your signature until you had seen them? A. That is correct.

(Testimony of Michael J. Curry.)

Q. Now you notice that portion which I read in the second line, beginning the second line, "Tax lawyers have decided we should file consolidated returns, which will do on or before March 15."

Do you recall the basis on which you made that statement, the information you had?

A. The information received from Miss Valouch, who received this telegram—that is, who wrote this telegram and placed it before me.

Q. Is your recollection clear that she prepared it? A. Yes, sir.

Q. Who were the tax lawyers to whom you refer?

A. Whitman, Ransom, Coulson & Goetz.

Q. Had you, prior to that time, received any advice from them with regard to the taxes for 1942? A. No.

Q. You have no recollection of any discussion with Mr. Polk prior to that date? [539]

A. I have no recollection of any discussion with Mr. Polk at that time.

Mr. Adams: I will offer the telegram as Defendant's Exhibit 8.

The Clerk: Exhibit 8.

(Telegram dated May 7, 1943, referred to above, was received in evidence and marked Defendant's Exhibit 8.)

Q. (By Mr. Adams): Where were the consolidated returns for 1942 prepared, Mr. Curry?

(Testimony of Michael J. Curry.)

A. At the 37 Wall Street office.

Q. And was data obtained from San Francisco, from the general auditors there, in connection with the preparation of the returns? A. Yes, sir.

Q. From whom did you obtain that data?

A. From Mr. DeGraff, the general auditor.

Q. Who did the actual work of preparing the return? A. Miss Valouch.

Q. And did Mr. Reilly also work on the preparation of the return?

A. Yes, Mr. Reilly did.

Q. And he worked in the New York office upon that? A. Yes, we provided a desk for him.

Q. Had Miss Valouch, in prior years, worked on the preparation of tax returns?

A. Yes, sir. [540]

Q. Did you consider that she was competent to do that work? A. I did.

Q. And when she was working on the returns, is it the fact that she was working under your supervision? A. Yes.

Q. You were treasurer of the parent corporation; is it the fact, is it not, that for many years you had under your charge the preparation and filing of the income tax returns? A. Yes, sir.

Q. When we speak of Mr. Reilly we are speaking of the accountant who was engaged after Mr. Polk and the firm of Whitman, Ransom, Coulson & Goetz were engaged as counsel? A. That is correct.

Q. Do you know whether or not Mr. Polk him-

(Testimony of Michael J. Curry.)

self took any part in the actual preparation of the returns? A. I do not.

Q. Who signed the 1942 tax returns?

A. I did.

Q. Who brought them to you for signature?

A. Miss Valouch.

Q. Do you recall any discussion with her at the time you signed the returns?

A. I do not recall any particular discussion. I just asked her if they were in proper shape for my signature, and she said, "Yes," and had Mr. Polk's approval, and so I signed them.

Q. Do you recall testifying upon the taking of your deposition as to the discussions which took place with respect to your signature upon the returns?

A. I recall the statement I made at that time.

Q. The reference I have refers to the following year, so I won't take it up at this time.

Do you recall noting the amount of tax due at the time you signed the 1942 returns?

A. Yes, sir. [542]

Q. Did you note that it was approximately the amount of the taxes shown upon the tentative returns that had been filed in the preceding March?

A. Yes, it was my practice to note those figures on the original of the return.

Q. Did you express satisfaction that these final returns indicated that the work done on the tentative returns had been rightly done?

(Testimony of Michael J. Curry.)

A. I do not recall what my reaction was.

Q. Do you have any recollection of that one way or the other? A. I have not.

Q. Do you have any recollection of expressing satisfaction of that sort at any time in reference to the 1942 returns?

A. I have no such recollection.

Q. Do you recall the occasion on or about May 18, 1943, when you met with Mr. Polk and Mr. Nicodemus and others in Mr. Nicodemus' office to discuss the 1942 returns? A. I recall the conference.

Q. Do you have any recollection whether or not at that time you expressed satisfaction that the work done on the tentative returns before Mr. Polk was engaged had been well done, as was indicated by the work done after he was engaged?

A. I have no such recollection.

Q. Would you say you did not express that satisfaction? A. No, I have not. [543]

Q. You have no recollection about it one way or the other? A. I have not.

Q. Have you any recollection about feeling satisfied about the tentative returns coming out the way the final returns did? A. No, I have not.

Q. Did Mr. Polk at any time tell you to sign the 1942 returns? A. No.

Q. Was he present when the returns were signed? A. No.

Q. Did you consider that you were signing the returns in the ordinary course of business?

(Testimony of Michael J. Curry.)

A. Yes.

Q. Do you now have any objection to the manner in which the returns for 1942 were prepared?

Mr. Phleger: If your Honor please, I submit that this is obviously not a proper question. It is not within the scope of the direct examination and hasn't any application to any issue in the case. What the witness believes about it now, it seems to me, is utterly and wholly incompetent, and immaterial.

Mr. Clark: We object to it upon the ground it is incompetent, irrelevant and immaterial. [544]

* * *

The Court: I do not quite see the point of that question. I will sustain the objection.

Mr. Adams: I will ask the next question, which will [545] doubtless meet the same ruling, but for the purpose of the record has anyone occupying any position with the plaintiff corporation, to your knowledge, ever criticized the returns?

Mr. Phleger: I object to that also on the ground it is irrelevant, incompetent and immaterial.

Mr. Adams: I understand the ruling to be the same.

The Court: You say, has anyone ever criticized the returns. Now, that is a pretty broad question.

Mr. Clark: We will add to the objection that it is vague, indefinite and unintelligible.

The Court: Isn't that one of the ultimate questions the Court has to decide?

(Testimony of Michael J. Curry.)

Mr. Adams: What I am seeking to get is a statement which I think we can establish better in some other fashion, if your Honor thinks these questions are objectionable. But no one has ever criticized, and there is no criticism in this case of the returns that were filed. The only question in the case is brought forth by our adversaries predicated on the fact that the returns filed were well filed, that all the work done in that regard was well done, and the claim here is to a share in the accomplishment, treating the matter as an accomplishment and getting the tax liability settled with the Federal Government. But I take it there is no criticism, can be no criticism, of the returns as filed, and, on the contrary, plaintiff's own case and the interveners' own case is [546] predicated upon the returns as filed.

The Court: You mean as to the amount involved?

Mr. Adams: As to all the work done in filing the returns. I take it it is conceded that had it not been for the fact that consolidated returns had been filed, these gentlemen would not be in court with a claim.

The Court: Of course not; that is obvious.

M. Adams: And the returns themselves as filed are not criticized in any respect or in any particular, in view of our adversaries' contention, as I understand it, that everything done in that connection was well done.

(Testimony of Michael J. Curry.)

The Court: You are trying to get the witness to say that it was a perfectly lawful thing to have filed the returns in the way they were filed, and that by doing so the plaintiff thereby debarred itself from prosecuting this suit? That is a question I have to decide.

Mr. Adams: Your Honor, I am not seeking an argument that bars the plaintiff from filing the suit. I want to establish a fact in the case, which is, as I understand it, that there is no criticism of these returns whatever.

The Court: You mean that as filed the returns were correct?

Mr. Adams: And the job was well done. There is no criticism of anything that was done in the way of filing the returns and the making of the settlement.

The Court: You mean the skill with which the returns [547] were prepared and filed?

Mr. Adams: I mean the accuracy, the compliance with regulations in all respect.

The Court: There is probably no dispute about that, is there?

Mr. Phleger: No, inasmuch as the net result was that there were no taxes for any of the years, I do not see how anybody could criticize the final result taxwise.

The Court: Then you are in agreement on that, if it is material.

Mr. Phleger: It is not material at all.

Mr. Adams: The taxes were paid, Mr. Phleger.

(Testimony of Michael J. Curry.)

There was \$4,200,000 paid for 1942, and then there was a stipulation that that should be treated straight across the board and try not to change it.

Mr. Phleger: Yes, and also a claim for refund for the entire amount also.

Mr. Adams: Which was disallowed in the course of the settlement.

Mr. Phleger: It was disallowed by your agreement or by the agreement of the parties.

Mr. Adams: By the stipulation entered into. The whole matter has been stated in the stipulation.

Mr. Phleger: That is right.

The Court: Let us get ahead. [548]

Q. (By Mr. Adams): When you filed the 1942 returns, Mr. Curry, you knew, did you not, that the plaintiff corporation on a separate return basis would have had no tax to pay?

A. The parent?

Q. Yes. A. I did, yes. [549]

* * *

Q. (By Mr. Adams): Mr. Curry, bearing in mind that you knew when you filed the 1942 returns that the corporation on a separate return basis would have had no tax to pay, did it occur to you at that time that this was any reason why the corporation should have filed a separate return?

A. It did not occur to me at that time.

Q. Who arranged for the filing of the 1942 consolidated returns?

A. Who arranged for the filing?

(Testimony of Michael J. Curry.)

Q. Yes.

A. On my instructions, they were filed.

Q. That is to say, it was done under your supervision and direction?

A. That is correct.

Q. As the officer in charge of that matter?

A. That is right.

Q. Where were they filed?

A. They were filed at the Customs House, Second District, in New York City.

Q. Who wrote the letter transmitting the returns to the collector at the Customs House?

A. It was the custom for Miss Valouch to write the letters and [551] place them before me for signing.

Q. Is that what happened in this case?

A. It is my recollection, yes.

Q. And you saw those letters at that time?

A. Yes, sir.

Q. And signed them yourself?

A. Yes, sir.

Q. Before you signed the 1942 returns you discussed them with Mr. Schumacher, did you not?

A. I have no recollection of discussing them with them. I might have informed them what the net result was, and so forth.

Mr. Adams: May that portion of the statement beginning, "I might have" go out?

The Court: Very well.

Mr. Adams: I will ask that the deposition of Mr. Curry be handed to him and direct his attention to page 2822, and particularly at page 2823.

(Testimony of Michael J. Curry.)

Q. Do you have that before you, Mr. Curry?

A. I have that before me.

Q. Directing your attention to page 2822, the third, fourth, fifth and sixth lines, being a portion of a letter identified in the deposition as Interveners' Exhibit 6, and which I believe is Plaintiff's 39A——

Mr. Clark: That is correct, Plaintiff's trial exhibit 39A.

Q. (By Mr. Adams): Do you notice the statement, "Mr. Curry has [552] told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942"?

A. Yes, sir.

Q. Does that refresh your recollection that you did discuss that subject with Mr. Schumacher before the returns were filed? A. Yes, it does.

Q. Do you have any recollection of what the subject of that discussion was?

A. No, sir, I have not.

Mr. Phleger: May the record show you are referring now, Mr. Adams, to the tentative return?

Mr. Clark: Filed on March 15, referred to in the letter of March 23, whereas your other interrogation was directed toward the time of filing, which was May 15, months later.

Mr. Phleger: The letter you are quoting from shows that right on its face, "with reference to the tentative tax return."

Mr. Adams: I will read the whole letter:

(Testimony of Michael J. Curry.)

“Mr. Curry has told me of the talk he had yesterday about the consolidated income tax return of the Western Pacific Railroad Corporation and its subsidiaries for the calendar year 1942. The return filed was a tentative one, an extension having been granted until May 15, 1943, to file a final return. As one of the trustees of the Western Pacific Railroad Company, I am looking to you [553] to co-operate with Mr. Matthew, general counsel for the trustees, in protecting the trust estate in the preparation of the final returns,”

this being a letter dated March 23, 1943, addressed by Mr. Schumacher to Mr. Nicodemus.

Q. Did Mr. Schumacher offer any objection to the filing of consolidated returns for the year 1942?

A. No, sir.

Q. Do you remember that on May 18, 1943, a conference was held at the office of Mr. Nicodemus at which you, Mr. Polk and Mr. Nicodemus and Miss Valouch and Mr. Reilly were present?

A. Yes.

Q. What was discussed at that conference, according to your best recollection?

A. Well, it was tax matters, but as I recall it was mostly on the question of depreciation.

Q. What was discussed on the subject of depreciation?

A. I was a listener, I did not take part in the discussion at all.

Mr. Adams: Would you read the question?

(Question read.)

(Testimony of Michael J. Curry.)

Q. (By Mr. Adams): Your answer, Mr. Curry, referred to what you did; my question was, if you will please tell me, what the discussion was so far as you recall it?

A. I don't remember.

Q. Have you any recollection of it at all? [554]

A. I have not.

Q. What other tax matters besides depreciation do you recall were discussed at that conference?

A. I have no recollection.

Q. You have no recollection of any of them?

A. No.

Q. Do you have any recollection that there was discussed at that conference the consolidated returns for the year 1942 which had been filed three days prior to that time?

A. I do not recall that that was discussed.

Q. You have no recollection about it one way or the other?

A. I have no recollection about it.

Q. Do you have any recollection that there was discussed at that conference anything relating to the advantages of filing the consolidated return instead of separate returns for 1942?

A. No, I have no recollection.

Q. No recollection about that at all?

A. No.

Q. Do you have any recollection of knowing at or about that time that there were substantial advantages in the filing of consolidated instead of separate returns covering the year 1942?

(Testimony of Michael J. Curry.)

A. Generally I understood there were advantages, yes, sir.

Q. Did you understand that they were substantial in the way of tax monies? A. Yes, I did.

Q. Do you have any recollection at that conference—I asked you this before but I will again—whether or not you expressed satisfaction that tentative returns filed under your supervision before Mr. Polk was engaged turned out, according to his word, to have been well done?

A. I have no such recollection.

* * *

Tuesday, February 8, 1949—2:00 P.M.

* * *

Q. (By Mr. Adams): Mr. Curry, continuously from the year 1927, is it the fact that you had in charge; and it was your responsibility, the filing of the income tax returns for the Western Pacific group? A. It was.

Q. Was it the practice of the group to file consolidated or separate returns?

Mr. Phleger: Now, may it please the Court, I don't want to, because I am not objecting to this, waive any objection. In fact, I will interpose an objection to the point that the practice prior to the critical day of March 15, 1943, with respect to the filing of tax returns, is irrelevant, incompetent and immaterial. All during that period they were in the relationship of parent and subsidiary, and after this date they were strangers.

(Testimony of Michael J. Curry.)

The Court: Well, of course, that really goes to the effect of the testimony, doesn't it, Mr. Phleger? The fact is not disputed, is it?

Mr. Phleger: Not whatever. I would so stipulate. I consider it, however, absolutely immaterial.

The Court: You are simply reserving your right to argue [557] the effect of that, if it is not material; then it wouldn't have any effect in that case.

Mr. Phleger: That's right. But I don't want to see the record encumbered with immaterial evidence.

The Court: Well, you have preserved the record so far as your claim is concerned.

Mr. Clark: Well, may it please your Honor, so far as the fact is concerned, it is true that all through this period consolidated returns were filed. But that doesn't necessarily connote an automatic practice. There is certain evidence which could be produced before your Honor to the effect that at least in 1941, with respect to excess profits taxes, they sat down and considered whether a separate or consolidated return would be more advantageous for the group. And if we are going to get into that as being an automatic practice followed, then even in addition to Mr. Phleger's point—which we concur in, that it is immaterial, directed to any time before——

The Court: Well, the witness wasn't asked about an automatic practice, he was asked whether or not from 1927 on consolidated returns were filed.

Mr. Clark: I thought the question involved the word "practice", your Honor.

(Testimony of Michael J. Curry.)

The Court: Well, it may be. Would you read that?

(Question read by the reporter.)

The Court: I will sustain the objection on the ground of [558] "practice" but if you wish to bring out the facts, if in fact consolidated returns were filed,—

Mr. Clark: That is the fact.

The Court: Then that is stipulated to, is it?

Mr. Clark: Yes, so far as we are concerned.

Mr. Phleger: And so far as we are concerned.

* * *

The Court: It has been already agreed that consolidated returns were filed from that time on, while the witness was connected with the companies. Now if you want to ask some more questions following that, go right ahead. [560]

* * *

Q. (By Mr. Adams): What was done about filing the returns, Mr. Curry, from 1927 forward, as far as you know, in the way of consolidated or separate returns?

A. Consolidated returns were filed during that period.

Q. And you knew that at that time, that the returns were filed? A. I did, yes. [561]

Q. What is the difference between a consolidated and a separate return?

A. A consolidated return takes into account the net results of the affiliated companies and a separate

(Testimony of Michael J. Curry.)

return would not consider those things at all. The corporation would file its own return.

Q. Where were the consolidated returns customarily prepared?

A. In the office at 37 Wall Street, New York.

Q. Was it customary to file them without their being sent back to the San Francisco office for checking?

A. I think the final work was done in the New York office and a copy of the return sent to San Francisco.

Q. After it had been filed?

A. After it had been filed, yes, sir.

Q. Was data obtained from San Francisco in connection with the preparation of the returns in the New York office?

A. Data were, yes, sir.

Q. Who conducted the correspondence with the San Francisco office on the subject?

A. It was conducted over my name invariably. I think sometimes Mr. Schumacher asked for information of Mr. Elsey.

Q. Aside from the occasions when Mr. Schumacher asked Mr. Elsey for information, it is a fact, is it not, that every letter that was sent to the San Francisco office with respect to taxes was a letter which you sent? [562]

A. Yes, sir.

Q. And every telegram was a telegram sent under your name?

A. Yes, sir.

Q. And you read the telegram before it was sent?

A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. And every bit of correspondence coming to the New York office, other than such as Mr. Elsey might write Mr. Schumacher in regard to income tax, was correspondence addressed to you?

A. Correct.

Q. Was that for the reason that you were in charge and responsible during all those years for the tax returns for the group?

Mr. Phleger: May I interrupt here to ask counsel to fix the time? Are you referring to right up to date or are you referring up to the filing of the 1942 returns or the 1943 returns? The testimony by this witness has been very clear and especially to the contrary with respect to these later years.

Q. (By Mr. Adams): Mr. Curry, you may answer the question and make a distinction as to time, if you have any.

A. May I have the question, please?

(Question read.)

A. Yes, sir.

Mr. Clark: May it please your Honor, we still haven't the time fixed. Does this relate to the period prior to March 15?

Mr. Adams: Let us ask the witness.

Q. What period of time did you have in mind, Mr. Curry, when [563] you answered the last question? A. The entire period from 1927 on.

Q. And when you say "on" you mean until the closing of the New York office? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. Who did the actual work of preparing the returns in the New York office?

A. Miss Valouch did, in collaboration with certified public accountants.

Q. There was a time, was there not, a considerable period of time, before Miss Valouch worked at this? A. Yes.

Q. Prior to the time when she worked at it was there a Mr. Andrews in the office who worked at it?

A. That is right.

Q. And he was an accountant in that office under your direction and supervision?

A. That is correct.

Q. So during the years when he was doing that work, he was doing it under your direction and supervision? A. Yes, sir.

Q. And thereafter when Miss Valouch came on, she similarly worked in the same fashion?

A. That is right.

Q. Were the returns to your knowledge ever submitted to the [564] board of directors of the parent corporation before they were filed?

A. No.

Q. The fact is, is it not, that the returns were filed without being taken up with the board of directors? A. Yes.

Q. Who signed the returns for the years 1927 to 1941?

A. They were signed by me as treasurer of the

(Testimony of Michael J. Curry.)

corporation, and I believe by Mr. Schumacher as president of the corporation in the early years.

Q. What was the customary method of allocating the tax among the members of the group that was due under the consolidated returns?

Mr. Phleger: I am going to object to that. He uses the word "practice" again. The facts speak for themselves with respect to the returns, and I think it is utterly immaterial what the practice was or what was in fact done prior to this date.

The Court: I am inclined to agree with that. Do you think anything could be gained by discussing that matter? What difference would it make what the practice was? I know that in the opening argument you and Mr. MacKinnon also argued that there was a relationship here that existed throughout the years, and that that has a bearing upon the issues here. Do we need a lot of evidence on that? [565]

* * *

Mr. Adams: The simple things are all you need to know. The idea that the plaintiff corporation has a claim is not a tax expert's idea at all. It hasn't any source in taxes. Part of our case is the tax loss is not involved at all. This claim is an afterthought that occurred years later, and yet the only facts that you needed to know to have that thought were the [569] very facts that were published and known to everybody who participated in the transaction.

(Testimony of Michael J. Curry.)

The Court: But that is not the claim of your opponents. The issues which they raise are that they did not get a chance to do that, that is all. They may have known about it.

Mr. Adams: This witness is one of our adversaries, the president of the plaintiff corporation.

The Court: Did you have any stock in any of these companies?

A. I did not.

Q. And did you represent any group of stockholders whose interest you were particularly concerned with? A. No, your Honor.

Q. Now, how about Mr. Schumacher? Was he a stockholder?

A. I don't know as to that. I don't think so. I might qualify my previous statement; the only stock I had in the corporation were qualifying shares.

Q. Now did Schumacher represent any particular group of stockholders in any of these companies?

A. Not to my knowledge, your Honor. [570]

* * *

Mr. Phleger: May I make a very brief statement? We conceive it utterly immaterial what this witness or any other witness may have known about the tax incidents of these returns, because we do not believe people lose rights because they know something.

We further submit that neither this witness nor any other witness knew the legal or economic consequences of the matters just mentioned; namely, the

(Testimony of Michael J. Curry.)

consolidated return and the utilization of the loss—knowledge that a consolidated returns is filed or that a loss is used in it is entirely different than a realization of what rights, if any, that may give rise to.

But finally, we press this point again. Counsel seems to assume that this witness is the president of the plaintiff [571] corporation. But during all of this time he was also the vice-president, assistant treasurer, and assistant secretary of the defendant corporation. And how what he knew could in any way bind the plaintiff in this litigation or its stockholders is beyond me.

The Court: Well, I am inclined to believe knowledge hasn't got anything to do with this case.

Mr. Adams: Well, if that is so, your Honor, how does it happen that the plaintiff on the examination of this witness took up the very question of his knowledge? Because this is directed to the inquiry opened by the plaintiff. Let me read to your Honor some of the examination by the plaintiff in this case, in which it is said first:

“I want to establish the manner in which the witness conducted the various positions which he held.”

Then the Court asked:

“What you are trying to show is that the president was just a presiding officer and a sort of figurehead?”

And counsel said:

That is correct.”

And then, when it came to tax matters, your Honor, on his own examination counsel said: (reading):

(Testimony of Michael J. Curry.)

“Q. Did you ever prepare a tax return?”

That is over this whole period of years. Now counsel opened that up. And then I asked the witness, and the witness uses [572] this ambiguous expression: “Taxes are Greek to me.” And that is on the record.

Now I think within the fair scope of cross-examination, I should be entitled to show the facts which were opened by opposing counsel, and with respect to which my present inquiry is now related.

The Court: Well, of course, I think that whether it was opened by plaintiff or not is really immaterial in this case. It wouldn't make any difference how much or how little knowledge. Knowledge would neither create nor defeat the cause of action here.

Mr. Adams: Well, your Honor, as our opponents have said,—

The Court: If they had a cause of action and it existed and they did not assert it and thereby lost their right to assert a cause of action because of something that happened, then they lost it. It wouldn't make any difference whether they knew about it or not, would it?

Mr. MacKinnon: Yes, definitely.

The Court: It would?

Mr. MacKinnon: Certainly it would. If this man knew of his rights and failed to assert his rights,—not this man, but this corporation—after all is said and done, irrespective of what else you say, he was the president of the corporation. The

(Testimony of Michael J. Curry.)

corporation was responsible for making him its president, and what this witness knows is imputable to the corporation. [573] His knowledge and the knowledge of the corporation is of very substantial moment on the basis of the bankruptcy bar, to say only one thing; also on the basis of whether or not they have the right and lost it.

The Court: Well, I never heard of that doctrine before. You mean that a person either has or hasn't a right, depending upon whether he knows he has one or not?

Mr. MacKinnon: I didn't say that, your Honor. I said at the inception of my argument in this case that you had what I conceive to be a basic legal question. That basic legal question is untrammelled by the color that has been injected into the case. I said there was a second step, and the second step is whether or not their failure to act when they should have acted precludes them from acting today. That is before you get down to duality, domination.

The Court: That is a different matter, Mr. MacKinnon, from knowledge. Yes, if a person has a cause of action and fails to take a step which he should have taken, he may lose his cause of action. But his knowledge hasn't got anything to do with it unless there has been some overreaching on someone else's part that has caused him, or prevented him, from doing it. But whether he knows that he has a cause of action or not, whether you know or

(Testimony of Michael J. Curry.)

you don't know that you have got a cause of action, if the Statute of Limitations runs, for example, you are finished.

Mr. MacKinnon: That is right. [574]

The Court: And I don't think it makes any difference in this case, either, whether there was any knowledge or not. What difference does that make? It is a question of whether or not there was a failure to assert in the proper forum a claim if one existed.

Mr. MacKinnon: That is right.

The Court: And if there was a failure to do it, if it is excusable on equitable or legal grounds, that is recognized.

Mr. MacKinnon: That is right. I will go along on that.

The Court: So knowledge hasn't got anything to do with it. I don't think it makes any difference who knew what and how much each man knew.

Mr. MacKinnon: I think it is a matter of considerable moment what knowledge a person possesses, because in evaluating the conduct or lack of conduct on the part of a person, his knowledge and his competency is a matter of considerable moment.

The Court: Well, let's assume he had very full knowledge of the matter. Now wouldn't that be just as much to your disadvantage as to your advantage?

Mr. MacKinnon: I don't think so, your Honor.

Mr. Levy: That is why the interveners are in

(Testimony of Michael J. Curry.)

the middle, your Honor; the stockholders sitting here are not chargeable with this man's knowledge, any more than the railroad company who held him as their vice-president.

Now if he knew everything that was involved in this matter, [575] couldn't Mr. MacKinnon say he knew it as president but didn't know it as vice-president, or that he didn't use his knowledge for the advantage of one rather than the other?

The Court: Well, I think I am still of the view that that knowledge is purely an immaterial issue here. But I think each side should be permitted to make whatever record you want within reasonable limit, so that it doesn't take too long, and so that it cannot be said that there wasn't proper opportunity to make the necessary record of what you want to present.

Mr. MacKinnon: May I just make one remark, your Honor, and then I will sit down, because I don't see any sense in prolonging this discussion. This case, in my opinion, could have been made in a very different way if plaintiffs in stating what they now state that they had that as their objective. Now bear in mind, I told you as these documents were going in, that they wanted coloring. They put in coloring. They have attempted to develop the fact that this man was a thorough incompetent. They have done that. Now then, can the defendants do other than meet that?

The Court: I don't think that is so, Mr. Mac-

(Testimony of Michael J. Curry.)

Kinnon. I didn't get any impression that there was any attempt to show he was an incompetent. It was developed that he was the kind of man that he was, and Mr. Schumacher took him over because he knew him, he had had experience, and he put him in charge of certain activities of this company. He had certain authority, [576] and certain authority he didn't have. I don't think there was any attempt to show inherently that the cause of action arose because of any lack of ability or competence on the part of this man; but that it arose just because of the fact that that was the position that he was occupying. I didn't get any such impression from the testimony.

Mr. MacKinnon: I am glad your Honor didn't because I believe it to be a concerted effort.

Now then, one more word, and let me say another thing——

The Court: Oh, I think this witness did nine or ten thousand dollars' worth of work for this company, without any question.

Mr. MacKinnon: I haven't any doubt about it.

The Court: Whatever he did, he didn't have to be a big shot to earn that much money, not according to some of the salaries we read about in the papers.

Mr. MacKinnon: Well, in railroad parlance, I think he had to be pretty big. But one thing more. We are not only meeting the plaintiff's case here, your Honor, we are meeting the interveners' case.

(Testimony of Michael J. Curry.)

The Court: Well,—

Mr. MacKinnon: Now, if your Honor says that the interveners cannot state their case, then obviously we could materially revamp our case. But we have got to meet whatever they present. [577]

The Court: Well, I think you should do that, and I am not going to prevent you in any way from doing it. The only trouble is, I think we are spending too much time on cross-examination of this particular witness when we should be getting to the issues of this case. We should be getting down to the point where you are going to present the matters upon which you have spent time in preparation, and as a part of your case. But there is too much being dragged into the cross-examination of this particular witness that is really out of place in cross-examination.

Mr. Adams: Your Honor, I don't think there is anything yet that I have asked that is not fairly within the scope of the direct examination.

The Court: Well, of course, if you want to stretch the rubber band far enough, I suppose you can ask anything under the guise that it is cross-examination.

Mr. Adams: I don't think I have asked anything, your Honor; I would say most seriously that the effort of which we have been conscious since the pre-trial on the part of the plaintiff to do what he calls "streamline the case", and bearing in mind the knowledge we have of this record, has been

(Testimony of Michael J. Curry.)

what appears to us an effort to substitute for the real facts an artificial picture.

The Court: Well, the witness was only asked in detail concerning the tax transactions in 1943, '44, and '45.

Mr. Adams: He was asked, your Honor, over the whole period. [578]

The Court: Oh, yes, he was asked some general question that was preliminary.

Mr. Adams: Right.

The Court: And then within the guise of the argument that you are entitled to cross-examine on that, you want to go back and take up year by year everything that was done in tax matters. I won't allow it in cross-examination because I just think it is too far afield to go into every year and every tax return that was filed in all the years before the critical period; merely because the witness on direct examination said that he didn't have very much knowledge of taxes, or that he signed the returns that were prepared for him in this particular matter, in this particular critical period, relying upon the advice of those who prepared them for him. Now just to go back over all the prior years and go into that seems to me to be too wide a latitude in cross-examination.

Mr. Adams: Your Honor will, I am sure, indulge me if I should make some offers and perhaps dispose of a matter that way, bearing in mind that some of these matters are material.

(Testimony of Michael J. Curry.)

The Court: Suppose you ask another question now so we can get the record in shape. What is it you have particularly in mind now?

Mr. Adams: The question was, What was the customary method of allocating the tax under the tax returns?

The Court: Now you are speaking of the years prior to 1943? [579]

Mr. Adams: I am speaking of the customary practice, the method that was pursued all the way through, including the year 1942.

Mr. Clark: Going back as far as 1927, your Honor, is that correct?

Mr. Adams: Prior to that, yes, that's right. That was when Mr. Curry's knowledge of the matter begins. That is correct. It begins in '27 and goes through '42.

The Court: Now was there an objection to that?

Mr. Phleger: There was an objection upon the ground it was not proper cross-examination and it was irrelevant, incompetent, and immaterial.

The Court: I will sustain the objection.

* * *

Q. (By Mr. Adams): Now, Mr. Curry, it is the fact, is it not, that during the very years in question here, that is, 1942, 1943 and 1944, also 1945, you personally examined tax data, tax clippings, matters related to taxes that came through your office? A. I personally saw it, yes.

Q. Yes, and checked it off? [580]

(Testimony of Michael J. Curry.)

A. And checked it off.

Q. And why did you do that?

A. For the simple reason that I wanted it to come to the attention of Miss Valouch and our tax counsel. I did not understand tax matters.

Mr. MacKinnon: I move to strike out that remark on the ground it is not responsive.

Mr. Clark: I think it is, your Honor.

The Court: He asked him why he did it. Now when you ask the witness why he does something, he can tell you everything and throw in the kitchen stove besides.

Mr. Adams: Very well.

Q. Was it because you didn't understand taxes that you underscored particular portions of those pieces of publicity?

A. That is right, that is quite right; because at times Miss Valouch would bring my attention to the matter of depreciation, and if I saw a clipping that mentioned depreciation, I would send it in to her. I might not have understood it myself.

Q. Now, Mr. Curry, turning to the 1942 returns, you recall we were discussing that before, at the noon hour? A. Yes, sir.

Q. Did Mr. Polk discuss with you the problem of changeover from retirement to depreciation accounting?

A. I have no recollection that he did.

Q. Do you recall we were speaking of the conference of May 18 in [581] Mr. Nicodemus' office?

(Testimony of Michael J. Curry.)

A. Yes, I had in mind qualifying that statement.

Q. Yes, go right ahead and do so.

A. I wanted to say that at this conference the matter of depreciation and retirement was discussed.

Q. Did Mr. Nicodemus participate in the discussion? A. He did.

Q. Did you? A. I did not.

Q. Did Mr. Polk discuss the reasons for filing consolidated returns? A. I don't recall.

Q. You have no recollection about that?

Mr. Phleger: I submit that that question has been asked and answered three times.

The Court: Yes, I think so.

Mr. Adams: This is cross-examination, your Honor.

The Court: Well, I know, but it still was asked and answered before on cross-examination.

Q. (By Mr. Adams): Did Mr. Nicodemus discuss at that meeting, to your recollection, anything having regard to the reasons?

Mr. Clark: Just a moment, the reasons for what, your Honor?

Mr. Adams: For filing consolidated returns. I had reference to the last preceding question. The answer was "no", as [582] far as you recall?

A. I don't recall that he did.

Q. (By Mr. Adams): Now do you have any recollection that it was agreed at the conference that Mr. Polk would write a letter setting forth

(Testimony of Michael J. Curry.)

the information that he had presented at the conference?

A. It is my recollection that he stated he would.

Q. And I would like you now to look at Plaintiff's 50, a letter of May 20, 1943, addressed to you by Mr. Polk, and I will also show you Interveners' Exhibit 29A, a letter dated May 21, 1943, and addressed by you to Mr. Nicodemus.

The Court: That is Interveners' Exhibit on deposition?

Mr. Adams: On the deposition, yes, your Honor. I will have it in a moment.

(Documents handed to the witness by the Clerk.)

Mr. Adams: Interveners' 29A, your Honor, is a letter of May 21, 1943, on the letterhead of the Western Pacific Railroad Company, 37 Wall Street, New York, from M. J. Curry, Vice President, Assistant Secretary and Assistant Treasurer, addressed to Mr. F. C. Nicodemus, 40 Wall Street, New York, New York:

"Dear Mr. Nicodemus:

"Enclosed is copy of Mr. Polk's letter of May 20, 1943, in re: tax matters. Very interesting! I suggest it might be well for you to drop over Monday morning, the 24th, and discuss with Mr. Schumacher, who will [583] leave that afternoon for San Francisco.

"Yours very truly,

M. J. CURRY."

(Testimony of Michael J. Curry.)

And there is attached to it, the letter which I have just read, Interveners' 29B, a copy of plaintiff's Exhibit 50, namely, Mr. Polk's letter to Mr. Curry of May 20, 1943.

Now there is also annexed to Interveners' 29B, Interveners' 30, but I take it that has no part in this.

Mr. Clark: Oh, I think not. No, that has no part of that portion of the exhibit, or the purpose for which it was put in. That copy of the letter, your Honor, is an identical copy to Plaintiff's trial Exhibit 50 already in evidence.

The Court: I understand that. But counsel is referring to something else, though?

Mr. Adams: Yes, with counsel's permission, I would like to remove Interveners' 30 which is annexed to this.

Mr. Clark: That is all right. Interveners' 30 doesn't bear on this particular situation.

Mr. Phleger: I would like to recall that on direct testimony, this fact that that letter was sent was testified to.

Mr. Adams: I don't understand that that is any objection to cross-examination.

Mr. Phleger: Well, I don't know. We think it is. It is already in evidence.

(Document handed to witness.) [584]

The Court: It does make the record a little bigger.

Mr. Adams: Very well. I haven't asked any

(Testimony of Michael J. Curry.)

question about it, I have just handed it up to the witness, your Honor.

The Court: You are not offering it in evidence?

Mr. Adams: No, I am about to offer Interveners' 29A, the letter of May 21, 1943, which I have just read to your Honor, as Defendant's Exhibit 9.

The Clerk: Exhibit 9.

(Letter dated May 21, 1943, referred to above, was received in evidence and marked Defendant's Exhibit No. 9.)

Q. (By Mr. Adams): Mr. Curry, referring to Defendant's 9, your letter of May 21, 1943, addressed to Mr. Nicodemus—that is correct, isn't it?

A. Yes, sir.

Q. You notice your letter begins by saying: "Enclosed is a copy of Mr. Polk's letter of May 20, 1943, in re: tax matters. Very interesting!"

When you wrote this letter to Mr. Nicodemus, had you read Mr. Polk's letter of May 20?

A. I had.

Q. Had you called it to the attention of Mr. Schumacher?

A. I had.

Q. What was Mr. Schumacher's comment?

A. He returned it to me with the notation, "Interesting letter" and my recollection is that he handed it to me and directed that [585] I send a copy to Mr. Nicodemus.

Q. And do you recall any further discussion with Mr. Schumacher at that time about Mr. Polk's letter?

A. I do not.

(Testimony of Michael J. Curry.)

Q. Did you discuss it with Mr. Schumacher at any later date? A. Not that I can recall.

Q. Now when you said in your letter to Mr. Nicodemus, "Very interesting!", what were you referring to?

A. Well, it was an extensive letter on tax matters and Mr. Schumacher remarked it was very interesting, and I felt the same way.

Q. You hadn't anything particularly in mind beyond that?

A. No, I had nothing in mind particularly. It was a long letter, and some of it I didn't quite understand. [586]

Q. Don't you think it is likely that you were referring to the paragraph in the letter which related to the possible use of the corporation's stock loss in the 1943 return?

A. When I stated "Very interesting"?

Q. Yes.

A. No, I do not recall that that was particularly in my mind.

Q. Do you recall that it was in your mind at all?

A. I do not, no.

Q. You have no recollection about that one way or the other? A. No, I have not.

Q. I would like to show you Railroad's Exhibit 313.

This, your Honor, is Mr. Curry's file copy of Defendants' 9 just offered in evidence, so I do not want to encumber the record with an additional

(Testimony of Michael J. Curry.)

piece of paper, but I will read from the file copy the notation on the file copy that I wish to bring to your Honor's attention. The notation is "Mr. Nicodemus came to office Saturday a.m. 22," and I will hand the document to the witness and ask if that is his memorandum (handing document to witness). A. It is.

Q. You wrote that on your file copy at or about that date? A. Yes, sir.

Q. Do you recall that Mr. Nicodemus did come to the office on the 22nd of May in reference to that letter?

A. I am quite sure he did. I stated here specifically that [587] he came to the office.

Q. Do you have any present recollection of it beyond what is stated in your memorandum?

A. No, my present recollection is that he discussed the matter with Mr. Schumacher and I was informed that he had done so, and I noted it on the file copy.

Q. When you say "discussed the matter," what matter do you mean?

A. The matter of that letter of May 20, 1943.

Q. Do you recall sending a copy of Mr. Polk's letter of May 20 to anyone else other than Mr. Nicodemus?

A. I do not recall, but the copy of my letter would show if it went to anybody else at the time.

Q. I will hand you Exhibit 9, and you have before you the copy of your letter right there in your hand, have you not, Mr. Curry?

(Testimony of Michael J. Curry.)

A. No, there is nothing to indicate on here that a copy went to anybody else but Mr. Nicodemus.

Mr. Adams: I would like to have Railroad's Exhibits 404 and 405. These are documents, your Honor, made a part of the depositions and I will try to describe them briefly. No. 404 is a letter from Mr. Elsey to Mr. Schumacher dated July 20, 1943, enclosing a copy of a letter from a man named Arthur Jansen of Barron's Weekly. Mr. Elsey also encloses a draft of a letter and memorandum prepared for Mr. Schumacher's signature in reply. The subject matter is "Income Tax." No. [588] 405 is Mr. Schumacher's letter to Mr. Jansen, together with Mr. Curry's letter to Messrs. Whitman, Ransom, Coulson & Goetz, and Mr. Polk's letter to Mr. Curry in reply, having reference to the same subject matter. These exhibits contain statements and I will read briefly one statement in here to give your Honor an idea of why we bring this before the Court.

Mr. Phleger: From what?

Mr. Adams: From 404-B.

Mr. Phleger: 404-B?

Mr. Adams: The draft of answer that was sent forward by Mr. Elsey to Mr. Schumacher, proposed to be given to Mr. Janson, and actually afterwards given to him. [589]

* * *

Mr. Adams: Your Honor, I would like to hand to the witness Railroad's Exhibits 404-A to -F and 405.

(Testimony of Michael J. Curry.)

The Court: Is this the correspondence we have been talking about?

Mr. Adams: Yes. 405-A, -B and -C. I will ask him one or two questions about them. I have not made the offer because I want to identify the witness' own notation.

Q. Mr. Curry, referring to Defendants' 404-A, Mr. Elsey's letter to Mr. Schumacher of July 20, 1943, will you please read into the record your own memorandum notation appearing upon the face of that letter?

A. It reads "Discussed 7-26-43. Consulted counsel F. C. N. [593] (Read this.) He suggested I take up with tax counsel. Signed, M. J. C. 7-26-43."

Mr. Phleger: Will it be stipulated that tax counsel was Mr. Polk of the Coulson firm?

Mr. Adams: Yes.

Q. That is correct, is it not, Mr. Curry?

A. That is correct.

Q. Turning to 405-A, the file copy of the letter as actually sent out by Mr. Schumacher to Mr. Jansen on July 30, 1943, will you please read your own notation appearing at the top of that letter?

A. 405-A?

Q. Right.

A. The notation in my handwriting reading "M. C. V."

Q. That refers to Miss Valouch?

A. That refers to Miss Valouch. "Note last paragraph Polk's letter. When you are ready for him let me know and will arrange conference. Signed, M. J. C."

(Testimony of Michael J. Curry.)

Underneath that, "Mr. Schumacher, note Mr. Polk's letter next attached." Initialed, "M. J. C."

Q. Mr. Polk's letter next attached is the letter marked Exhibit 405-B that you have in your hand?

A. 405-B?

Q. Yes. A. Yes, sir. [594]

Q. Will you read into the record your notation appearing on the left-hand side of the paragraph?

A. It states in my handwriting "Discussed 8/4/43, M. J. C. to M. C. V."

Q. Does that refresh your recollection that you had a discussion at or about that time with regard to the application to change over from retirement to depreciation basis for tax purposes?

A. Yes, it refreshes my recollection. [595]

* * *

Mr. Adams: What Mr. Phleger asks is that it be noted that Exhibit 405-B, Mr. Polk's letter to Mr. Curry, is addressed to Mr. Curry as Vice President, Western Pacific Railroad Company.

Mr. Phleger: That is the document as to which the witness has just been interrogated.

Mr. Adams: That is correct.

Q. One question, Mr. Curry, about these papers. In view of the fact that Mr. Jansen's inquiries related to taxes, how did it happen that you took the matter up first with Mr. Nicodemus rather than Mr. Polk?

A. I do not recall the circumstances, but it might have been due to the fact—I will change that. It was probably due to the fact that Mr. Schu-

(Testimony of Michael J. Curry.)

macher asked me to confer with Mr. Nicodemus about it.

* * *

Q. (By Mr. Adams): Mr. Curry, do you recall during the course of your examination by Mr. Clark, you referred to a call which Messrs. Offerman, Jaffin and Wershil made upon you?

A. I do.

Q. In that connection I would like to call to your attention a portion of your deposition, pages 3567 and 3568.

May Mr. Curry have the deposition?

(Deposition handed to witness by the clerk.)

Q. (By Mr. Adams): Now, Mr. Curry, beginning 8 lines from the bottom of page 3567, I will read the questions and answers as [596] put to you by Mr. Clark, the answers as you gave them:

“Q. Were you present at the meeting in Mr. Nicodemus’ office with Mr. Jaffin, Mr. Wershil and Mr. Offerman? A. No, sir.

Q. Directing your attention to the first paragraph of that memorandum, does that first paragraph refresh your recollection in any way?”

Now, your Honor, I see I read something referring to a memorandum, and I must now read what precedes the part I have just called to Mr. Curry’s attention to make it plain.

The Witness: May I ask what page?

Q. (By Mr. Adams): It is the same page, 3567.

As Mr. Curry did not have the page before him, suppose we start afresh.

(Testimony of Michael J. Curry.)

The Court: Very well.

Q. (By Mr. Adams): Mr. Curry, at the top of page 3567, the following question appears by Mr. Clark:

“Q. Mr. Curry, I show you our exhibit No. 61 in this proceeding, which is copy of a memorandum made by Mr. Nicodemus on December 8, 1943, and ask you if that would serve to refresh your recollection as to the time when Mr. Wershil and Mr. Jaffin and Mr. Offerman came to your office at 37 Wall Street (handing to witness)?

A. Yes, sir, it does. [597]

Q. Would you please state first in what way this memorandum refreshes your recollection?

A. I recall the circumstances as stated in this memorandum.

Q. Have you read the entire memorandum?

A. I have.

Q. Were you present at the meeting in Mr. Nicodemus' office with Mr. Jaffin, Mr. Wershil and Mr. Offerman?

A. No, sir.

Q. Directing your attention to the first paragraph of that memorandum, does that first paragraph refresh your recollection in any way?

A. Yes. I recall distinctly that it was late in the afternoon, that they did come in, and I did state to Mr. Nicodemus at the time that I did not feel competent to answer their questions and I was sending them over to him.

Q. Do you recall what questions they discussed with you?

(Testimony of Michael J. Curry.)

A. They were in my office but a short time, and they wanted to know if I didn't think that the corporation should get something for the stock that they were turning over to the reorganization committee. And at that time I saw that it was going to be something that perhaps I couldn't answer properly, and I turned [598] them over to Mr. Nicodemus."

Mr. Clark: Suppose you read the next question.

Mr. Adams: I will. The next question, your Honor, is:

"Q. Do you have in mind, Mr. Curry, the agreement of November 22, 1943?

A. Did I have in mind or do I have in mind?

Q. I am asking if you now have it in mind. Do you know what it is I have in mind in mentioning the agreement of November 22, 1943?

A. Yes, sir."

Did you suggest that anything further be read, Mr. Clark?

Mr. Clark: No, that is fine.

Q. (By Mr. Adams): Now, at the time your deposition was taken, Mr. Curry, did you give those answers to those questions? A. I did.

Q. And were they true?

A. Yes, they were.

Q. And are they also true now according to the best of your recollection? A. They are.

Q. Now, then, I would like to direct your attention to a portion of your deposition, the one you

(Testimony of Michael J. Curry.)

have in your hand, beginning at page 3582, beginning three lines from the top of page 3582, and I will read it:

“Q. What was the first occasion, Mr. Curry, upon [599] which you ever heard of the idea that the corporation might share in tax savings on account of the consolidated returns?”

Mr. Adams: And I may say, your Honor, these questions were put at the time by Mr. Clark.

“A. Well, as I remember, it never occurred to me until the time the suit was filed.

Q. When you say at the time the suit was filed, you are referring to the stockholders' suit that was filed in New York in the middle of 1946?

A. Yes, sir.

Q. Do you mean that the first time that you heard any discussion of that was after the suit was filed? A. Yes, sir.”

Q. Now, at that time, when your deposition was taken, did you give those answers to those questions? A. Correctly, yes, sir.

Q. And were they true?

A. Yes, they were.

Q. And are they true now, according to your best recollection?

A. According to my best recollection, they are.

Q. Now, you will notice that in your last answer on that page 3582, that I just read, you say that the first time you ever heard any discussion of the idea that the corporation might share in tax savings on

(Testimony of Michael J. Curry.)

account of the consolidated return was after [600] the stockholders' suit began in New York in 1946?

A. Yes.

Q. Now, that being so, Mr. Curry, it means, does it not, that at the time you had the discussion with Messrs. Offerman, Jaffin and Wershil in December, 1943, that idea was not discussed at that time?

A. The matter of the tax saving was not discussed at that time.

Q. And in your answers that you gave to Mr. Clark when he examined you a day or so ago in connection with this subject, I take it that you did not then intend to say you discussed that subject with Messrs. Offerman, Jaffin and Wershil?

A. I don't quite follow you on that.

Mr. Adams: Would you read it, please. If you don't follow it, Mr. Curry, you are entitled to say so and tell me what is not clear about my question.

(Question read.)

Mr. Adams: Well, I don't wonder that you didn't understand it. It is a little hard to understand. I stated it too long, possibly.

Q. You have in mind, Mr. Clark asked you upon your testimony here in court a few days ago, when you said something about the incident when Mr. Offerman, Mr. Jaffin and Mr. Wershil came in to see you—you remember that?

A. Yes, sir. [601]

Q. Now, then, in the answers you gave to Mr.

(Testimony of Michael J. Curry.)

Clark about that when he was examining you last week, it is true, is it not, that you did not intend to say that you discussed with Messrs. Offerman, Jaffin and Wershil the idea of the tax saving for this tax loss?

A. Well, that is correct. May I continue? My recollection is that about all they said to me was that they felt the stockholders should get something for that stock that was turned over to the reorganization committee; no tax savings mentioned.

Q. That is your best recollection at this time, of the occasion when they saw you? A. Yes, sir.

Q. And that occasion was in December, 1943?

A. Early in December, as I recollect.

Q. Right. That is all I have about your deposition at the moment, Mr. Curry.

Now, do you recall learning, Mr. Curry, in the early part of January, 1944, that the amounts which had been accrued on the railroad company's books for Federal taxes had been reversed?

A. Yes, sir.

Q. And what was your understanding at that time? That is, in January, 1944—what was your understanding as to why those accruals had been reversed?

A. Well, it was my understanding that the matter of tax returns hadn't been decided by the Internal Revenue Bureau and [602] they set that amount up as a contingent tax liability.

Q. Well, you are speaking now of the reserve,

(Testimony of Michael J. Curry.)

are you not? A. The reserve, yes.

Q. What you and I were talking about was about the reversal of the tax accruals; the reversal came, did it not, before the reserve was set up?

A. Yes, it came in December, as I recall.

Q. It was the reversal in the December account?

A. That is as I recall it.

Q. And those December accounts were closed during the month of January and published in that month, of the following year? That is, 1944?

A. That is my recollection.

Q. And there had been before that time a large sum accrued on the railroad company's books for account of Federal taxes? A. That's right.

Q. And then in the December accounts, that accrual was reversed so that the year's statement showed nothing accrued for those taxes?

A. That's right.

Q. And you learned about that in January, 1944? A. I did.

Q. Now, then, what was your understanding at that time as to why the accruals had been reversed?

A. Well, as I stated a while ago, there was a question as to [603] whether or not the returns filed would be accepted by the Internal Revenue Bureau, and it was anticipated that losses would erase any possibility of tax payment.

Q. When you speak of losses erasing tax payment, you mean the major one was the corpora-

(Testimony of Michael J. Curry.)

tion's big stock loss? A. Yes, sir.

Q. That is the \$75,000,000 item?

A. Yes, sir.

Q. And it is the fact, is it not, that that came to your attention in January of 1944?

A. That is my recollection.

Q. And was it your understanding that that loss would be employed as a deduction in a consolidated return to be filed by the parent company?

A. It is my recollection it was talked about at that time, yes.

Mr. Adams: May I ask that Plaintiff's 56 be handed to the witness?

(Document handed to the witness by the clerk.) [604]

The Witness: Plaintiff's 56 is before me.

Q. (By Mr. Adams): And that is Mr. Elsey's letter to Mr. Schumacher of January 24, 1944?

A. Mr. Elsey's letter to Mr. Ehrman with a copy to Mr. Schumacher.

Q. You are correct, and I had particular reference to the letter from Mr. Elsey to Mr. Schumacher, but looking at that one, Mr. Curry, isn't that letter which you have in your hand the original letter from Mr. Elsey to Mr. Schumacher?

A. No, this is a copy.

Q. May I look at it? I have reference, Mr. Curry, to the letter from Mr. Elsey to Mr. Schu-

(Testimony of Michael J. Curry.)

macher.

A. That is defendant's exhibit 319.

Q. Yes, that is a part of Plaintiff's 56, marked also Railroad Defendant's Exhibit 319, that is the original letter, isn't it?

A. Now, this is the original letter, yes, sir.

Q. Have you looked at that? Will you please do so? A. Yes, sir, I have read it.

Q. Does that serve to assist your recollection that in January of 1944 you did learn that it was proposed to set up a reserve fund and that the tax accruals had been reversed?

The Court: He has already testified that that was the case.

Mr. Adams: Yes, I am asking him a question to which I believe the answer is in the affirmative.

The Witness: I do not recollect seeing this letter. There [605] is nothing on it to indicate that I noted it.

Q. What about that line (indicating)?

A. Well, there is a green underscoring under the word "consolidated," indicating that I had read it.

Q. In connection with the reversal of the tax accruals and the proposition to set up a reserve fund, you knew, did you not, that it was contemplated that a consolidated return would be filed and that the corporation's stock loss would be a reduction in the consolidated return? A. I did.

Q. Was Mr. Schumacher also aware of those facts?

(Testimony of Michael J. Curry.)

A. It goes without saying he got the letter, marked it, and was aware of the facts, yes, sir.

Q. You discussed the matter with him?

A. I consulted Mr. Schumacher on everything like that, everything that came in, that I was seeking advice on, and so forth. I consulted with him or with Mr. Nicodemus.

Q. You do recall, do you not, later on you discussed the reserve with Mr. Schumacher?

A. I do.

Q. And you discussed the reversal of the tax accruals with him?

A. Yes, sir.

Q. Do you recall whether or not you discussed these subjects with Mr. Nicodemus or Mr. Campbell?

A. I do not recall that I did. [606]

Q. You have no recollection about it at this time?

A. Not at this time, no, sir.

Q. When it did come to your attention that it was proposed to file consolidated returns, and that the corporation's stock loss would be a deduction on them for the year 1943, did it occur to you that there was anything inappropriate in filing such returns?

Mr. Phleger: I am going to object to that, counsel, if it please the Court, I do not think that is proper cross-examination, and I do not think his answer would be material or relevant, if it were.

Mr. Adams: I think it is appropriate, your Honor. It is a question of his state of mind.

The Court: If he answers "yes" to that ques-

(Testimony of Michael J. Curry.)

tion, I could make a finding in the case that there was an admission by the defendant that it was inappropriate. I do not think that that sort of question is factual in nature. If this witness were to say "yes" to that question, or, rather, to say "no," to that question, then he could be answering that question as an officer of the defendant and I could make a finding based upon that answer, if it were appropriate, in the decision of the case, and I could make it the other way, too.

Mr. Phleger: It is the other way, then.

Mr. Adams: We have no fear of the facts. We feel, your Honor, in a case of this sort that instead of drawing inferences [607] based upon some matters that are not in contest, some facts that are now established that we all agree upon, that your Honor should have the true setting. It is in pursuance of an effort to develop the true setting, what these people did and how they acted, that I am asking these questions.

The Court: That is quite correct, Mr. Adams, but it never adds anything, it does not aid the Judge for a man who is on the witness stand, identified with one of the companies that is involved in the litigation to say whether he thinks it was right or not. You would not need me to decide it then.

Mr. Adams: His bona fides is an issue in the case. It is drawn in issue by the interveners.

Mr. Phleger: There is no issue of this witness' bona fides at all.

(Testimony of Michael J. Curry.)

Mr. Adams: I said the interveners.

Mr. Clark: We are not concerned with what Mr. Curry did or what he knew. This man held two positions. We have shown that and demonstrated. That makes all this line of questioning utterly immaterial. [608]

* * *

The Court: I think it is immaterial. If you attach any great significance to it, I will overrule the objection and let him answer it.

Mr. Adams: Your Honor, I hear the interveners admit that it is immaterial. I would like to hear them say they consider that there is nothing in this case in the way of intentional misconduct. When I hear that, then I may concede it is immaterial. I have not heard it yet.

Mr. Clark: We are not willing to concede that at this point, your Honor, but we will make this statement to your Honor, that Mr. Adams will hear argument from us at the close of this case to the effect that the good or bad faith of these dual officers makes not one bit of difference on the basis of the plaintiff's theory, with which we concur, as to the effect of that duality. In my opening statement I said perhaps the evidence would develop some other second theory, may it please the Court, that we felt it our duty to develop before you. In our view that has developed to some extent on the prima facie case already in.

Mr. Adams: Your Honor has heard the statement.

(Testimony of Michael J. Curry.)

Mr. Clark: It simply amounts to the thing your Honor has heard of a conscious and deliberate use by certain actors in this transaction of the corporation for the benefit of the company, [610] and that has been developed by Mr. Phleger's examination of this witness.

The Court: That is all admitted. There is no question about that. The only question is whether there is any materiality to any claim that there was any conscious fraudulent motivation involved. The facts are what they are, that there was a consolidated return filed, these were the officers of both corporations, and the effect of filing the return was that the operating company, as a result of the loss of the parent company, was free from a certain income tax liability. Those facts are apparently not subject to any dispute in the case. We could have stipulated to that a long time ago. If that does not give rise to a cause of action——

Mr. Clark: There is one further fact, your Honor, and that is that the management of the tax matters was taken over by employees selected and paid for by the defendant company.

The Court: Whatever those facts are, I will overrule the objection. If you wish the witness to answer this question, irrespective of what you are asking your opponents to concede, if you think that that is germane to the case. Repeat the question.

Q. (By Mr. Adams): Mr. Curry, at this time in January, 1944, when it came to your attention

(Testimony of Michael J. Curry.)

that it was proposed to file consolidated returns for 1943 and that it was proposed that the corporation's stock loss should be a deduction in the returns [611] offsetting the income of the court's trustees, did it occur to you that there was anything inappropriate in filing such returns?

A. No, sir.

Q. Did it occur to you that it was in any way unfair to the parent corporation for such returns to be filed——

Mr. Clark: Same objection, your Honor. It is absolutely immaterial.

Mr. Adams: I think it is within your Honor's ruling.

Mr. Clark: Considering the positions this man held.

Mr. Phleger: It is also improper cross-examination.

The Court: He is a witness in the case. I will overrule the objection.

The Witness: It did not.

Q. (By Mr. Adams): Did anyone suggest to you at any time before you heard of the stockholders suit in the middle of 1946 that it was in any way unfair to the corporation for such returns to be filed? A. Not to my recollection.

Q. You knew in January, 1944, did you not, that the corporation on a separate return basis would have no taxable income? A. I did.

Q. Did that fact in any way suggest to you that

(Testimony of Michael J. Curry.)

the corporation should file separate returns?

A. No, it did not.

Q. You knew in January, 1944, did you not, of the November 22, [612] 1943, agreement which called for the transfer of the company's stock held by the corporation and the reorganization committee? A. I did.

Q. Did the fact that this transfer was contemplated suggest to you that the corporation should file a separate return for 1943?

A. It did not.

Q. Was that suggestion ever made to you by anyone before you heard about the stockholders' suit in the middle of 1946? A. No, sir.

Q. I would like to show you a document, being a letter addressed by you to Mr. Nicodemus on March 9, 1944, identified as Railroad Defendant's Exhibit 406. Mr. Curry, is that a file copy of a letter you wrote to Mr. Nicodemus on March 9, 1944? A. It is.

Mr. Adams: Your Honor, this letter refers to the matter of the Delaware franchise tax of the plaintiff corporation, and it winds up with the following end paragraph:

"In view of conditions confronting the corporation filing of consolidated federal income and excess profits tax, etc., I should like to have your advice as to whether payment of the 1941 tax should be made on or before April 1."

Q. Mr. Curry, referring to the portion I just

(Testimony of Michael J. Curry.)

read, does the reference to the 1941 tax refer to Delaware franchise tax? [613]

A. It does.

Q. Would you please read into the record your handwritten notation upon this letter?

A. It reads: "Mr. Campbell discussed this with me and agreed we should request extension to July 1, 1944."

Q. Do you recall that there was a discussion to that effect at that time? A. I do.

Mr. Adams: I offer the document as Defendant's No. 10.

Mr. Clark: Being formerly identified as what, Mr. Adams?

Mr. Adams: As Railroad Defendant's Exhibit 406.

(The document referred to was thereupon received in evidence and marked Defendant's Exhibit 10.)

Q. (By Mr. Adams): Mr. Curry, referring to our exhibit 10, when you wrote "in view of conditions confronting the corporation filing of consolidated federal income and excess profits tax, etc.," did you assume that Mr. Nicodemus knew that consolidated returns would be filed for 1943?

Mr. Phleger: I object to that upon the ground it is not proper cross-examination. It is utterly immaterial.

The Court: I will sustain the objection. I do

(Testimony of Michael J. Curry.)

not see the relevancy of that, whether he assumed that somebody else knew something.

Mr. Adams: I will ask the next question, your Honor, to indicate what I think is the materiality.

Q. If this was your assumption, what basis did you have for making it? [615]

* * *

The Court: What is the difference between what you are offering and what has already been offered?

Mr. Phleger: That is my point.

The Court: I do not think there is anything that has developed on cross-examination. Is there any dispute about this matter?

Mr. Adams: Oh, yes.

The Court: What is the dispute? [615A]

Mr. Adams: The dispute is this, your Honor, and this is what we expect to hear when we get to argument, that certain gentlemen on our side of the case took this income tax matter in charge and handled it. I am not talking about Mr. Curry. I am talking about certain gentlemen on our side of the case. So they produced Mr. Curry and had him testify that taxes were Greek to him. He has volunteered it three times. All he did was to look at the returns that Miss Valouch presented to him, and when she said they were all right he sent them in blind reliance on what she said, and because she told him that Mr. Polk had looked at them. When this case is brought to your Honor, it is going to be contended, as stated here time and again, that

(Testimony of Michael J. Curry.)

the people on our side, on the defendant's side, handled this transaction and took that belonging to the plaintiff for their own. Now, your Honor, we propose to show that that is not so, and it is partly through this witness. He is not the only witness, but it is our purpose to establish to your Honor's satisfaction, as we think we can, that everybody on the corporation's side who was significant, Mr. Schumacher, Mr. Curry, and the other gentlemen, knew all about this. They were in a position to act for the corporation. They were free. They did not bring it to Judge St. Sure. Why? Because nobody thought of the idea.

The Court: Mr. Adams, I am following what you are saying, but what has that to do with the letters that this witness wrote to Nicodemus about the franchise taxes? How does what you are [616] proving here show anything differently from the letters already put in evidence on the same subject matter? Because he wrote two letters, does that make any difference?

Mr. Adams: No, your Honor. The interveners put before Mr. Curry certain matters about the Delaware franchise tax and he testified they were unrelated to the federal income tax, and I propose to show they were not.

Mr. Clark: Oh, no.

Mr. Phleger: That is not so.

Mr. Clark: The letter is in evidence.

The Court: I may be in error. My memory may

(Testimony of Michael J. Curry.)

not be good, but I think in one of those letters the interveners introduced, Curry to Nicodemus, he referred to the fact that there might be some decision necessary with respect to the franchise taxes because of the filing of the consolidated returns.

Mr. Phleger: Exactly.

Mr. Clark: Exactly. [617]

* * *

Q. Referring to that letter of March 9, 1944——
The Court: Defendants' Exhibit 10.

Q. (By Mr. Adams) (Continuing): ——Defendants' Exhibit 10, Mr. Curry, you will notice your statement there in the last paragraph of that letter?

(Document handed to witness.)

A. Yes, sir.

Q. Now, when you wrote, "In view of conditions confronting the corporation, filing of consolidated Federal income and excess profits tax returns, etc.," was it your understanding that Mr. Nicodemus understood that consolidated returns were to be [628] filed for 1943? A. Yes.

Q. And what was the basis of your understanding of his understanding?

Mr. Phleger: Well, now, I am going to object to that. I didn't object to the previous question because I wanted to save time. But I think that is not proper cross-examination. I think it is wholly immaterial.

Mr. Adams: I shan't argue it, your Honor. If

(Testimony of Michael J. Curry.)

your Honor considers the question objectionable, I will accept the ruling.

The Court: Well, this is in March of 1944?

Mr. Adams: Yes, your Honor.

The Court: Well, the Coulson firm had already written a letter, hadn't they?

Mr. Adams: Oh, yes, yes, and given advice.

The Court: Concerning the matter?

Mr. Adams: That is right.

The Court: And there has also been evidence here as to this witness' knowledge of that letter.

Mr. Adams: Yes, your Honor.

Mr. Phleger: And that the letter was sent to Mr. Nicodemus.

The Court: And that the letter was sent to Mr. Nicodemus, yes.

Mr. Adams: That is correct.

The Court: That is already in. Now, what is the purpose of [629] this question?

Mr. Adams: We want to establish the relationship between the Delaware franchise tax problem of the plaintiff corporation and the fact that it was planned to file this return for the year 1943——

The Court: Well, that was what he said in this letter.

Mr. Adams: Yes, that is correct. My last question addressed to Mr. Curry was what was the basis of his understanding that Mr. Nicodemus knew of the plan to file such consolidated returns.

The Court: Well, because he had already sent

(Testimony of Michael J. Curry.) .

the letter, hadn't he, to him? That is, Coulson's letter to Nicodemus, which he had received? I think he has already testified to that.

Mr. Adams: Yes. That was May 20, 1943, some ten months before.

Well, I don't want to argue it further, your Honor.

The Court: Obviously this witness knew that Nicodemus knew that they were going to file these returns, because he had sent him all this data.

Mr. Adams: Well, if that would be stipulated by opposing counsel, we would have cleared that question immediately.

Mr. Phleger: After having said he doesn't want any stipulations, it is interesting, at least, that he asks for a stipulation. [630]

The evidence shows that this witness sent a copy of the paradoxical letter to Mr. Nicodemus shortly after it was received. There is no question about that. We put that in as direct testimony. What this man may have thought Mr. Nicodemus thought seems to me the height of immateriality and certainly not proper cross-examination.

The Court: Well, I think that that statement is correct, isn't it, counsel? What do you have to say as to that?

Mr. Adams: I didn't ask Mr. Curry what he thought Mr. Nicodemus thought.

The Court: You asked him what was the basis of his understanding as to what Mr. Nicodemus understood.

(Testimony of Michael J. Curry.)

Mr. Adams: What he knew about this. Now, that is quite a different matter from what people are thinking.

The Court: Well, what is it you want him to answer to that question?

Mr. Adams: What was the basis for his understanding that Mr. Nicodemus knew consolidated returns were to be filed for the year 1943 with the stock loss in them.

The Court: Can you answer that?

The Witness: Well, we had talked about consolidated returns beginning early in '43. Mr. Nicodemus was aware of it, and when I wrote the letter in March 9, 1944, my thought was that he knew that consolidated returns were to be filed.

Mr. Adams: For that year, for the year 1943?

The Witness: For the year 1943. [632]

* * *

February 9, 1949, 10:00 A.M.

Cross-Examination

(Resumed)

By Mr. Adams:

Q. Mr. Curry, did Mr. Polk ever direct you to sign any tax returns? A. No, sir.

Q. The same thing is true, is it not, with respect to the refund claim? A. That is correct.

Q. When you signed the 1943-1944 consolidated returns you knew, did you not, that the plaintiff corporation would not pay any tax on a separate return basis? A. Yes, sir.

(Testimony of Michael J. Curry.)

Q. And when you signed the 1943 return—that was in July of 1944—you knew, did you not, of the reserve fund for contingent tax liability that had been set up by the trustees? A. Yes, sir.

Q. And when you signed the 1943-1944 returns, did you expect that if any taxes were to be assessed upon them, that the taxes would be paid by the companies having income in the group? [636]

* * *

Q. (By Mr. Adams): Do you undersatnd the question, Mr. Curry?

A. Let me have it again, please.

Q. When you signed the 1943-44 returns, who did you expect would pay the taxes if any should be assessed for those years?

A. Well, it was my thought that the company would pay it out of the reserve.

Q. Did you ever suggest to Mr. Polk that he had any duty to advise you or the plaintiff corporation of possible claims of the corporation against other members of the group?

A. Did I ever direct him to advise me?

Q. My question was: Did you ever suggest to him that he had any such duty?

A. No, no. I depended upon him to advise me of our rights, if any, so far as the corporation was concerned.

Q. Did you ever tell Mr. Polk that you depended upon him to advise you of any rights of the corporation against other [638] members of the group?

(Testimony of Michael J. Curry.)

A. I don't recollect that I did.

Q. That is the fact, is it not? You did not give him any such statement? A. I did not.

Q. Did you ever make any such suggestion to Mr. Coulson? A. I did not.

Q. Did Mr. Polk or Mr. Coulson or anyone else connected with the Whitman firm ever refuse to answer any question you asked with regard to taxes? A. No.

Mr. Adams: Now I will ask that Plaintiff's Exhibit 69, Mr. Curry's letter to Mr. Polk of May 5, 1947, be exhibited to the witness.

(Document handed to witness by clerk.)

The Witness: Yes, I have it.

Q. (By Mr. Adams): That is, of course, your letter to Mr. Polk, is it not, Mr. Curry?

A. Yes, sir.

Q. And you prepared that letter?

A. Our attorneys, Mr. Nicodemus, and my recollection is, Mr. Osborn assisted in it.

Q. Yes. That is all I have on that paper.

(Document returned to clerk by the witness.)

Q. Now, with regard to the closing of the New York office, what [639] we have in mind, Mr. Curry, is that the office was physically closed on May 1, 1945? A. As of April 30, 1945.

Q. As of April 30, 1945? A. Yes, sir.

Q. Now, you heard, did you not, that it was

(Testimony of Michael J. Curry.)

planned that the New York office should be closed along about the end of 1944?

Mr. Clark: I will object to that as being vague and indefinite, your Honor. Claimed by whom?

Mr. Adams: I didn't understand I used the word "claimed."

Mr. Clark: I misunderstood counsel, then.

Mr. Adams: Would you read it, please. It may be that I should correct my question.

(Previous question read by the reporter.)

The Court: You mean did he hear it before the end of 1944?

Mr. Adams: Yes.

The Witness: I don't recall that I did.

Q. (By Mr. Adams): When, according to your best recollection, did you first hear about the proposal to close the New York office?

A. Well, it was my recollection that it was definitely brought to me about the 1st of April or the latter part of March of that year.

Q. And from whom did you first hear about that? [640]

A. From some one of the officers of the railroad company who was in New York at the time?

Q. Was that Mr. Droit?

A. Well, I can't say. I remember Droit was here and Engelbright was here and Elsey were—I mean, in New York.

Q. Mr. Droit was the secretary of the railroad company? A. He was.

(Testimony of Michael J. Curry.)

Q. Mr. Engelbright was assistant to the president of the railroad company?

A. That is correct.

Q. And both of those gentlemen had their offices in San Francisco? A. That is correct.

Q. Mr. Elsey was the president of the railroad company? A. Yes, sir.

Q. He had his offices in San Francisco?

A. Yes, sir.

Q. And your recollection, then, is that at some time about April of 1945 you talked to one or more of those gentlemen about the closing of the New York office?

A. That is my recollection, yes.

Q. And is it your recollection that that was your first information that the New York office was to be closed?

A. Yes, it is my recollection that that is about the first time I heard definitely that it was to be closed. [641]

Q. You knew, did you not, that the trustees' operation of the railroad had ceased at the end of 1944?

A. I knew that, yes. And I knew that the trustees, under the court order, were to carry on until May, I believe it was.

Q. Yes, that is correct. That is to say, the trustees' purpose and intent was to continue until May 1, 1945? A. That's right.

Q. But you knew, did you not, that they were

(Testimony of Michael J. Curry.)

no longer operating the railroad after the end of 1944? A. Yes.

Q. Now, in the discussion that you had with Mr. Droit or Mr. Engelbright or Mr. Elsey, any of those gentlemen, did you have any discussion with regard to your personal situation and what might be done about it? A. I don't recall that I did.

Mr. Adams May I ask that Mr. Curry's deposition, the volume containing page 2803, be handed to the witness.

(Handed to the witness by the clerk.)

The Witness: Yes, sir, I have it.

Q. (By Mr. Adams): Now, Mr. Curry, directing your attention to the question in the middle of the page, "Had that subject ever been discussed with you by Mr. Coulson?" I will read some questions and answers which you gave upon your examination by Mr. Clark at the time of taking of your deposition:

"Q. Had that subject ever been discussed with you [642] by Mr. Coulson? A. No.

Q. Or by anyone else?

A. I don't know that it would be a proper answer to say—it was intimated that something would be done for me after the closing of the office. But what was to be done, I had no knowledge.

Q. Who intimated that to you?

A. I think it was either Mr. Droit or Mr. Engelbright of the railroad company, who were in New York prior to this time."

(Testimony of Michael J. Curry.)

Do you recall that those questions were asked and that you gave those answers?

A. Yes, sir.

Q. And were they true? A. Yes, sir.

Q. And now that your recollection is refreshed, do you recall that either Mr. Droit or Mr. Engelbright intimated to you that something would be done for you after the closing of the New York office? A. Yes, I recollect it now.

Q. Now, did you also discuss that subject with Mr. Schumacher? A. Yes.

Q. And please state to the best of your recollection what discussion you had with Mr. Schumacher as to what might be done [643] in your personal connection after the New York office was closed.

A. Well, I don't recollect exactly what was said; it was just a subject that was talked about off and on. I explained to him my personal situation, that I had been advised that the office would close and that there was no place for me in the railroad organization. However, that I understood that Mr. Coulson possibly would have something to offer.

Q. And do you mean that when you discussed the matter with Mr. Schumacher, you had already heard that Mr. Coulson might have something to offer? A. Yes.

Q. And from whom had you learned that before you discussed the matter with Mr. Schumacher?

A. I can't recollect exactly whether it was Elsey, Engelbright or Droit. It was either one of those

(Testimony of Michael J. Curry.)

three that intimated to me that something might be done for me.

Q. And at the time of your discussion with them, then, it was your understanding that something might be done, emanating through Mr. Coulson?

A. Yes, sir.

Q. Now, may I direct your attention to page 3707 of your deposition.

Mr. Adams: It is in another volume, I believe.

(Handed to the witness by the clerk.)

The Witness: Might I say here that these questions, I [644] qualified it at a later testifying?

Q. (By Mr. Adams): You should, Mr. Curry, if you fail to state that; you are entirely correct in asking to do so. Go ahead and make any statement you wish.

A. The only thing I had in mind was I believe I stated the first intimation I had of what Colonel Coulson had in mind was the letter I received from him of June 6, I think it was. I later qualified that by stating I recall that he did call me over to the office and told me that he had something in mind for me, but he mentioned no figure.

Q. When you were speaking of that discussion with Mr. Coulson and of the later letter, they came, did they not, after you had had your discussions with Mr. Droit and Mr. Engelbright?

A. Yes.

Q. And after you had your discussions with Mr. Schumacher?

A. That is right.

(Testimony of Michael J. Curry.)

Mr. Adams: I think this would be just cumulative, and therefore I won't go into it. I refer to page 3707, Mr. Curry, and if you desire to look at it, I suggest that you do that. If after looking at it you want to say anything further, you are privileged to do so. It is right there in front of you.

The Witness: 3707?

Mr. Adams: 3707.

The Witness: Yes, that is what I just testified to.

Q. (By Mr. Adams): It is the fact, is it not, Mr. Curry, that [645] you did not solicit the retainer arrangement? A. That is correct.

Q. It came to you unsolicited on your part?

A. Yes, sir.

Q. I would like to direct your attention to a letter from Mr. Coulson to you dated June 6, 1945, which is Plaintiff's Exhibit 33 in the case.

I desire, your Honor, to draw to Mr. Curry's attention Plaintiff's Exhibit 33. I had better read the whole letter. It is short.

“Enclosed is the check of this firm for \$750, which represents a quarterly payment on your retainer by this firm for services in connection with the pending tax matters with which we are dealing in behalf of the Western Pacific Railroad Company. As agreed, this retainer is to be on an annual basis of \$3000, and this quarterly installment covers the period from May 1 to July 31, 1945. You will note that there are no deductions from this check on account of taxes or social security premiums, since

(Testimony of Michael J. Curry.)

you are in no sense an employee of this office or the Western Pacific Railroad Company, but are merely retained as an independent contractor to make studies and reports and perhaps subsequently act as a witness [646] in connection with the pending tax problem.”

Mr. Curry, does this letter state your understanding of the purpose of your retainer?

A. Yes, it was a standby arrangement in connection with—for use of me in connection with tax matters.

Q. Did you have any different understanding of the purpose of your retainer from what is stated in that letter? A. I did not.

Q. Did Mr. Coulson or any of his associates ever suggest to you that your retainer had any different purpose? A. No, sir.

Q. Did you understand that your retainer had obliged you in any respect to take any action adverse to the corporation's interests?

A. No, sir.

Q. During the period of your retainer, which ran from this time in 1945, when it began, until the end, 1948, did you ever take any action which you considered adverse to the interests of the corporation? A. No, sir.

Q. Did you consider that your action in signing the 1944 tax return, which you signed in your office over there at 40 Wall Street in the Whitman, Ransom suite, did you consider that that action was in any way disadvantageous to the corporation?

(Testimony of Michael J. Curry.)

A. I did not. [647]

Q. When you signed that return you signed it, did you not, in your capacity as president of the plaintiff corporation?

A. I believe it was signed in the capacity of treasurer—president and treasurer.

Q. President and treasurer?

A. That is right.

Q. During the time you were in receipt of the retainer and occupying an office in the Whitman, Ransom suite, you felt entirely free, did you not, to take any action in behalf of the corporation which you thought was required in its interest?

A. Yes, sir.

Q. And you likewise felt entirely free, did you not, to decline to take any action which you thought was disadvantageous to the corporation?

A. Yes, sir.

Q. I have no further use of the document, Mr. Curry. Did you advise the board of directors of the plaintiff corporation of your retainer by the Whitman, Ransom firm and your occupancy of an office in their suite?

A. I do not recall that I did at a board meeting, but they were all advised as I saw them subsequently.

Q. When you say they were all advised, do you mean——

A. I informed them of the retainer arrangement.

Q. And that includes Mr. Nicodemus, does it not?

(Testimony of Michael J. Curry.)

A. I am not sure that I mentioned it to Mr. Nicodemus at the [648] time.

Q. Did you advise Mr. Campbell, Mr. Nicodemus' partner?

A. I have no definite recollection of it at this time.

Q. May I ask that you refer to your deposition, page 3702? A. Yes, sir.

Q. 3706, Mr. Curry. I misspoke as to the page number, beginning with the question in the middle of the page 3706, these questions being put by me at the time of the taking of your deposition:

“Q. Do you recall whether Mr. Nicodemus discussed with you the matter of the effect upon your personal financial situation of closing the New York office? A. I do not recall that he did.

Q. Did you discussion that subject with Mr. Schumacher? A. I did, yes, sir.

Q. What was that discussion, Mr. Curry?

A. Well, as I recall it, we went into the matter from the standpoint of the salary that I was getting at that time, and the fact, having become 65 or over, that I was to get a pension from the railroad company under the provisional retirement plan that was effective January 1, 1945, as I recall.

Q. And was it under that provisional retirement plan that you were to draw down an amount of some \$88 a month? [649]

A. \$89.54.

Q. Do you recall whether you had any discus-

(Testimony of Michael J. Curry.)

sion with Mr. Schumacher in regard to you receiving a retainer from Whitman, Ransom, Coulson & Goetz?"

I think I directed your attention to this. I will read the answer.

"A. I do not recall whether we discussed anything like that as a retainer. I understood at the time that some consideration was being given to taking care of me in some way because of the closing of the office and the cutting me off from the payroll, and so forth, but what it was I didn't know at that time."

Your Honor, I read something on my own examination that I am sure is not as close to this subject as it ought to be, so I do not think this is proper cross-examination. In fact, I will say so myself. I thought this came more closely to the knowledge of the directors about the occupancy of the office and the retainer.

Q. Mr. Curry, I want to ask you about that: Who among the members of the board of directors to your knowledge were acquainted with the fact that you were receiving a retainer from the firm of Whitman, Ransom, Coulson & Goetz?

Mr. Phleger: That calls for a conclusion. I have no objection to his asking him whether he told them.

Mr. Adams: I will submit the question, your Honor. It is [650] to his knowledge.

The Court: If it is within his knowledge I will allow it.

The Witness: The question, please?

(Testimony of Michael J. Curry.)

(Question read.)

The Witness: I do not remember.

Q. (By Mr. Adams): Mr. Curry, please state what you do remember about having discussed that matter with the directors from time to time after you came into the occupancy of that office.

A. I have no recollection of the discussion. All I recall is when the time was opportune, I mentioned it to the directors individually.

Q. It is your recollection that you mentioned it to each of them individually from time to time?

A. Yes, sir, that is my recollection.

Q. I do find the place in the record I was looking for, if I may have that last volume handed back to Mr. Curry. 3703. Mr. Curry, beginning six lines from the bottom of page 3703 of your deposition, I will read you the questions I put at the time of the taking of your deposition and your answers:

“Q. Did you after you moved into your office over at Whitman, Ransom, Coulson & Goetz office at 40 Wall Street, did you at some time thereafter inform the other directors that you had your office there?

A. It is my recollection that at a meeting of the [651] board I notified them of that, yes, sir.

Q. Do you recall when you notified the directors of that fact?

A. Well, it was at a meeting very shortly after I moved, the first meeting, as I understand it. It

(Testimony of Michael J. Curry.)

was just a matter of notifying them that I was coming over to 40 Wall Street.”

You recall giving those answer to those questions? A. I do, yes.

Q. Are they correct according to your present recollection of the matter?

A. It was my recollection at that time when I gave this testimony that it was at a meeting of the board. Upon reflection, it might have been after the close of the meeting or later that I encountered the directors and informed them of the fact.

Q. Now, if you will turn to page 3705, six lines from the bottom:

“Q. Is it your recollection that it was at the meeting of July 31, 1945, that you told the directors that you had your office in the suite of Whitman, Ransom, Coulson & Goetz?

A. That is my recollection at the moment. I saw the directors in the meantime, and as I recall, informed them that my office was at 40 Wall Street.”

Do you recall giving that answer to that question?

A. Yes, I do.

Q. Is that now correct according to your best recollection? A. Yes.

Q. Did any member of the board ever take any exception to the arrangement about the office and your retainer? A. None whatever.

Q. During the time your office was in the suite of Whitman, Ransom, Coulson & Goetz did you

(Testimony of Michael J. Curry.)

carry on your activities as president of the corporation from that office? A. I did.

Q. Did Mr. Coulson or any other person connected with the Whitman firm ever attempt to interfere with your activities as president of the corporation? A. No, sir.

Q. And did Mr. Coulson or anyone else connected with that firm ever attempt while you were in that office to influence your conduct as president of the corporation? A. No, sir. [653]

Q. Is it fair to say, Mr. Curry, that during the period you were retained by the Whitman, Ransom, Coulson and Goetz firm, you conducted the corporation's affairs to the best of your ability for the best interests of the corporation?

A. Yes, sir.

Mr. Adams: Now I will ask the witness to turn to page 2804 of his deposition.

(Handed to the witness by the Clerk.)

Q. (By Mr. Adams): Beginning at the bottom of page 2804, I will read a portion of some questions put to you by Mr. Clark and your answers: (reading)

“Q. What services, if any, have you rendered pursuant to the retainer arrangement which is outlined in Interveners' Exhibit 38?”

Which I identify as Plaintiff's Exhibit 33.

Q. (continuing):

“A. The only service that I performed since this

(Testimony of Michael J. Curry.)

arrangement was effective was in executing the tax returns as treasurer of the corporation.

“Q. What tax returns do you refer to?

“A. The consolidated tax returns of 1942, 1943, and 1944.

“Mr. Shaw: I would suggest, Mr. Clark, that you refresh the witness’ recollection as to the time on this.

“Q (By Mr. Clark): You will observe, Mr. Curry, that according to Interveners’ Exhibit 38, the retainer [654] arrangement which is outlined therein did not commence until as of May 1, 1945.

“A. That is right.

“Q. Bearing that in mind, do you want to change your last answer?

“A. I do. I was mistaken.

“Q. Would you please now answer the previous question, namely, as to what services, if any, you have rendered to date under this retainer?

“Mr. Shaw: Since May 1, 1945.

“Mr. Clark: I will accept that qualification.

“Q. (By Mr. Clark): Answer the question.

“Mr. Osborn: ——”

He was one of the plaintiff’s counsel, your Honor, and is, of course, he is on the record.

“Mr. Osborn: I would like to point out to the witness, if I may, that your question calls for a conclusion by the witness; that he might not have performed any services under the retainer.

“Mr. Clark: If he did not, he can say so.

(Testimony of Michael J. Curry.)

“A. I cannot recall that I have performed any services under that retainer.”

Now, Mr. Curry, do you recall giving those answers? A. I do.

Q. And referring to the last answer, “I cannot recall that I [655] performed any services under that retainer,” is that correct?

A. Well, outside of the tax return that I signed while in that office, and the power of attorney, those are the only services I can recall that I performed.

Q. Well now, you had in mind at the time you gave your testimony, did you not, the tax returns? You will notice that the record I just read to you referred to the tax returns, and I am asking you if, at the time you gave that testimony, you did not have that in mind.

A. Well, as I recall, I was confused as to certain questions that were asked of me at that time, and inasmuch as it was June 1, 1945, that I went over to the 40 Wall Street office, the only services that I performed while there was the execution of the '44 federal tax return and the power of attorney.

Q. Now, Mr. Curry, is it your understanding that you were being paid by the retainer to sign that return?

A. The only thing I understood by that was that I was to stand by; it was a stand-by arrangement. There was no understanding as to just what I would be called upon to do, and I just continued along in that office waiting for anything I might do in connection with the object of that retainer.

(Testimony of Michael J. Curry.)

Q. You bear in mind, do you not, that the retainer was not paid to you so that you could sign a return; isn't that the fact?

A. Well—— [656]

* * *

A. Specifically, that is the fact, yes.

Q. (By Mr. Adams): And when you gave your last answer that I read to you, "I cannot recall that I have performed any services under the retainer," you believed at that time, did you not, that that answer was correct?

A. Yes, because it was a tax return; it was a tax matter and the letter of June 6 stated specifically I was to stand by on tax matters. And as that was one of the functions of the president and treasurer, to execute these tax returns—— [658]

* * *

Q. Mr. Curry, do you recall in your examination by Mr. Phleger two days ago, the following questions and answers? Page 323, Mr. Phleger, towards the bottom.

"Q. (By Mr. Phleger): I show you, Mr. Curry, Plaintiff's Exhibit No. 54, which is a letter on the Coulson letterhead dated January 11, 1944 addressed to Mr. Elsey advising with respect to the 1943 tax accruals, their reversal and other matters. That is the so-called opinion letter. Did you receive a copy of that letter?

"A. I did not.

"Q. Did you ever see a copy of that letter?

(Testimony of Michael J. Curry.)

tion of the agenda for board meetings and preparation of the minutes, incidental things like that.

“Q. Did you consider the signing of these tax returns one of the necessary acts to be carried on by you for the corporation?

“A. Yes, I did.”

Q. Did you give those answers to those questions at that time, Mr. Curry? A. I did.

Q. And did you then believe they were true?

A. Yes, sir.

Q. And are they true, according to your recollection? A. Yes, sir.

* * *